

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JOHNSON & JOHNSON HEALTH)
CARE SYSTEMS, INC.,)
Plaintiff,)
v.) No. 4:23-MC-00527-SEP
EXPRESS SCRIPTS, INC.,)
Defendant.)

MOTION HEARING
BEFORE THE HONORABLE SARAH E. PITLYK
UNITED STATES DISTRICT JUDGE

AUGUST 10, 2023

APPEARANCES:

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1 AUGUST 10, 2023

2 (The proceedings commenced at 1:27 p.m.)

3 **THE COURT:** Good afternoon. We are on the record in
4 the United States -- I'm sorry, excuse me; force of habit --
5 *Johnson & Johnson Health Care Systems, Inc. vs. Express*
6 *Scripts, Inc.*, Case No. 4:23-MC-527.

7 Counsel, would you announce your appearances,
8 please.

9 **MR. LoBIONDO:** George LoBiondo from Patterson
10 Belknap for Johnson & Johnson Health Care Services.

11 **THE COURT:** Say your last name again.

12 **MR. LoBIONDO:** LoBiondo.

13 **THE COURT:** LoBiondo, okay, thank you.

14 **MS. BRISSON:** Katherine Brisson from Patterson
15 Belknap for Johnson & Johnson Health Care Services.

16 **THE COURT:** Okay.

17 **MS. BAUER:** Good afternoon. Beth Bauer from Hepler
18 Broom, also for Johnson & Johnson Health Care Services.

19 **THE COURT:** Okay, can I refer to your client as
20 Johnson & Johnson today, or should I refer to them as
21 something else?

22 **MR. LoBIONDO:** Johnson & Johnson is fine, Your
23 Honor.

24 **THE COURT:** All right. Thank you.

25 **MS. LEDDEN:** Kate Ledden from Husch Blackwell

1 representing Express Scripts.

2 **MS. HELLMANN:** And Sarah Hellmann also from Husch
3 Blackwell on behalf of Express Scripts.

4 **THE COURT:** Ms. Ledden and Ms. Hellmann. All right.
5 I'll do my best. If you want to remind me -- well, you don't
6 have to remind me of your names; I know your names. But is
7 everyone speaking today, or are we having one or the other
8 person taking the lead?

9 **MR. LOBIONDO:** I'm going to speak on behalf of
10 Johnson & Johnson, Your Honor.

11 **THE COURT:** Okay, great.

12 **MS. LEDDEN:** And I'm speaking on behalf of Express
13 Scripts, Your Honor.

14 **THE COURT:** Okay. Why don't we have everybody speak
15 from where they are unless I ask you to come to the podium
16 because there might be a fair amount of going back and forth,
17 and I don't really want there to be -- yeah; okay.

18 If it's okay -- and even if it's not -- I'm going to
19 run the show today, so I will let you know what I want to hear
20 from you about. We are not going to rehash anything or
21 certainly not everything that you have provided in briefing
22 already because I'm very capable of reading and digesting all
23 that myself. And so what I will be asking you today will be a
24 little bit in follow-up and an application of the standard
25 that I'm going to apply.

1 I want to start, though, with some housekeeping.
2 There are two motions for leave to file under seal on the
3 docket, and those are going to be denied, and I'll tell you
4 why.

5 We have a local rule, 13.05, that requires a
6 proponent of sealing to state the specific legal and factual
7 reasons justifying the sealing, among other requirements, and
8 the fact that certain information has been protected as
9 confidential by parties in a case pursuant to a protective
10 order is relevant but not dispositive of whether the
11 information or material will be sealed when filed with the
12 court. That's a direct quote from the Local Rule 13.05.

13 So to the extent that what it is that you're citing
14 as a basis for sealing it here is inconsistent with that, in
15 other words, if -- just the fact that it is subject to a
16 confidentiality agreement is not sufficient to justify sealing
17 it on the public docket here. You do also have to satisfy the
18 requirements of Local Rule 13.05 to state those specific legal
19 and factual reasons.

20 And to move to the next part of the analysis, when
21 you cite those specific legal and factual reasons, I will be
22 evaluating whether you have provided a compelling governmental
23 interest sufficient to override the First Amendment right of
24 public access. You can find orders I have already published
25 under this local rule in the last year or two on Westlaw, and

1 I invite you to look at them before you submit your motion so
2 that you can increase your odds of getting it granted.

3 But you have 14 days from today to resubmit a motion
4 to keep those documents under seal or else they will be filed
5 on the public docket. Is that clear?

6 **MS. LEDDEN:** Yes, Your Honor.

7 **MR. LOBIONDO:** Yes.

8 **THE COURT:** If you have questions about how -- I
9 think you managed to do the technical process part, which is
10 more than I can say for a lot of people first encountering
11 Rule 13.05, so well done. Maybe you did call my docketing
12 team, but to the extent you have questions about process, you
13 can always call my docketing team.

14 I have now given you what you need, I think, to do
15 the legal work. But if you have any questions, feel free to
16 follow up with the Court. Okay, that is it for those.

17 For the supplemental authority, I granted that
18 motion to, you know, provide me with supplemental authority.
19 It seems to me that the authority provided is plainly relevant
20 to today's conversation, and both parties are free to make
21 whatever arguments they want for or against that authority in
22 their answers to my questions today, but that has been handled
23 at least insofar as whether I'm going to allow it to be
24 considered. Of course, I am.

25 And now then, we can get to the motion to compel.

1 There are many RFPs in dispute, I noted, from your briefing
2 today, everything after 3(i), right, subpart (i) of RFP 3
3 remain to be resolved, and so I am going to -- as I said, I
4 have analyzed your briefing, so I just want to lay out a few
5 ground rules for today's conversation.

6 Things I do not care to hear about today:

7 Who said what to whom before the filing of the
8 motion. I find that Plaintiffs adequately documented
9 compliance with the meet-and-confer requirement, and I reject
10 Defendant's request for attorneys' fees in light of its
11 refusal to produce anything at all in response to the subpoena
12 without being ordered to do so by this Court. I don't need or
13 want to hear anything else about either of those arguments
14 today. We have a lot to do without getting into things that
15 are unnecessary.

16 I also don't want to hear any argument that ESI --
17 what am I supposed to call your client? Express Scripts?

18 **MS. LEDDEN:** We usually go by Express Scripts, Your
19 Honor.

20 **THE COURT:** Okay, sorry, I've been reading the
21 briefing, and so ESI is in there, but it's very easily
22 confused with another term that I use all the time, and so I
23 would prefer to call it Express Scripts. Thank you.

24 Any argument that Express Scripts should not have to
25 produce anything at all in response to the subpoena until

1 after party discovery has been completed, I don't want to hear
2 that either. I reject that as a principle. I don't think
3 there's any blanket rule that says that, and I'm unpersuaded
4 that I should impose one here.

5 Of course, if you want to talk to me about why
6 certain requests may be duplicative of things that are going
7 to be produced in party discovery, I'm open to hearing that
8 argument but not the argument that as a general rule Express
9 Scripts should not have to produce anything that is otherwise
10 discoverable and nonduplicative until after party discovery is
11 complete.

12 So I'll tell you that the standard I intend to apply
13 to the request, the motion to compel, is that I am going to
14 grant it as to everything that is likely to be relevant to the
15 underlying litigation and is discoverable under Rule 26
16 provided Plaintiff has taken reasonable steps to avoid
17 imposing undue burden or expense, as they are required to do.

18 And, for example, one thing that they would need to
19 do under that is avoid seeking discovery that is unreasonably
20 cumulative or duplicative of discovery already being produced
21 by a party to the underlying litigation.

22 So that is the standard that I'm applying. I intend
23 to ask some questions about how to apply that standard to the
24 RFPs that remain in dispute, and that will be the bulk of our
25 conversation today.

1 Before we do that, I would like to hear about --
2 from the parties about the relevance of the District of New
3 Jersey's limitation of discovery in that matter, the
4 underlying matter, to Janssen therapies. I understand from
5 the supplemental authority that was submitted that in the case
6 involving Accredo or the miscellaneous case involving Accredo,
7 if I'm saying that correctly, Johnson & Johnson limited its
8 subpoena or conceded to the limitation that only -- that
9 Accredo should only have to produce information related to
10 non-Janssen drugs and patients -- or sorry -- to not have to
11 produce things related to non-Janssen drugs and patients. Has
12 that been discussed between the parties here?

13 **MR. LOBIONDO:** I think we discussed it a little bit
14 this morning, Your Honor. We are not seeking to -- you know,
15 we served these subpoenas in January before we had the benefit
16 of that ruling. We are not seeking to enforce the subpoena as
17 to purely non-Janssen material, so if they have transaction
18 data about some other drug company's drugs, we're not seeking
19 that data.

20 I think there was maybe a little bit of confusion in
21 the briefing about whether or not that ruling meant that they
22 did not have to produce transaction data that did not involve
23 SaveOn. Part of the reason that we want transactional data
24 and we've asked for a relatively -- you know, transactional
25 data that both involve SaveOn and not SaveOn is that we, for

1 our damages analysis, need to be able to have a baseline
2 between what was happening with these patients before the
3 SaveOn scheme affected them and after.

4 And so for us to do that, we don't need -- for these
5 purposes today, we don't need data about other manufacturers'
6 drugs, but we do need data that goes to transactions from
7 before the SaveOn scheme was implemented, which SaveOn
8 obviously -- SaveOn the party -- is not going to have. ESI
9 has that because ESI had a relationship with these plans and
10 these patients before the SaveOn scheme came into existence.

11 **THE COURT:** Okay. So we're talking about -- and
12 forgive me if I get some of this wrong. You're talking about
13 in that case, when you're saying before, you're talking about
14 people who eventually enrolled in SaveOn but who already were
15 on Johnson & Johnson therapies before that, and you want to
16 compare their pricing and transactional situation after they
17 enrolled in SaveOn to that before; correct?

18 **MR. LOBIONDO:** That would be part of it certainly.
19 There's probably -- I'm not a damages expert, but I'm sure
20 there's going to be different but-for scenarios that the
21 damages experts on both sides are going to want to analyze.
22 And so it might not just be a patient that didn't have SaveOn
23 and then did have SaveOn. You also need to look at patients
24 that were affected in 2022 versus patients that never
25 interacted with SaveOn because their plan, you know, ESI

1 pitched the SaveOn program, but the plan decided not to do it.
2 So we also need to have that baseline of comparators, so it's
3 not just a before and after. It's also kind of in realtime,
4 patient A has been affected and harmed this way; patient B has
5 not.

6 **THE COURT:** Okay. But patients A and B both have to
7 be on Janssen therapies in order to be relevant; correct?

8 **MR. LoBIONDO:** Yes, and I apologize. Johnson &
9 Johnson, Janssen for these purposes are --

10 **THE COURT:** Are going to be interchangeable?

11 **MR. LoBIONDO:** -- are interchangeable, but I --

12 **THE COURT:** That's excellent news. Okay, thank you.
13 I think I understand your point. But you are not seeking
14 things related to, information related to patients that have
15 not been on Janssen therapies?

16 **MR. LoBIONDO:** That's true as to the data. As to
17 the documents, if there are documents that are exclusively
18 pertaining to other manufacturers because they're e-mailing
19 back and forth about another drug, we're not seeking to
20 enforce that. However, if they have internal communications
21 about manufacturers in general or about the SaveOn scheme in
22 general, we don't think it has to have the word Johnson &
23 Johnson in it for that to apply because a lot of the scheme is
24 indistinguishable regardless of whether it's an Abbott drug or
25 a Johnson & Johnson drug or a Novartis drug.

1 So in that respect for the custodial communications
2 and that kind of thing, even if it doesn't say J&J, a lot of
3 that might be responsive because they're just talking about
4 the scheme at a high level.

5 **THE COURT:** SaveOn, the SaveOn scheme.

6 **MR. LoBIONDO:** Exactly.

7 **THE COURT:** Okay. And then -- but when you're
8 talking about the data, you're talking about the data you've
9 requested for purposes of evaluating damages?

10 **MR. LoBIONDO:** Correct.

11 **THE COURT:** Okay, thank you. How does Express
12 Scripts understand the application of that ruling were I to
13 take it over, you know, lock, stock and barrel and do exactly
14 here what the New Jersey Court has required? How do you think
15 it would be operational?

16 **MS. LEDDEN:** I think, Your Honor, I would make two
17 points. First and foremost, the opposing party has
18 received -- or Johnson & Johnson has already received data
19 from SaveOn, so it has that bucket of data, right, regarding
20 Janssen products.

21 Now it's in the process of litigating issues in the
22 Tennessee court relevant to the data from Accredo. And just
23 by way of background, Accredo is a specialty pharmacy, and
24 Express Scripts is a PBM, so we don't have direct contact with
25 patients. So a significant amount of the data that we would

1 be receiving would be from Accredo directly.

2 And so our position as it relates specifically to
3 that is I know they're still in that process right now. The
4 judge in Tennessee has indicated the nature of the burden
5 there; it's noted that there's a burden there.

6 **THE COURT:** Yes.

7 **MS. LEDDEN:** Because I wish it was as easy as
8 Googling; right?

9 **THE COURT:** Right.

10 **MS. LEDDEN:** Or in this instance just pulling all of
11 the patients for a seven-year period who had any of these
12 Janssen products.

13 **THE COURT:** Right. Okay, let me stop you for a
14 second. There is an ongoing briefing issue going on in
15 Tennessee about the burden related with collecting the data
16 specifically; correct?

17 **MS. LEDDEN:** That is correct.

18 **THE COURT:** Okay. So I expect we'll get to that.

19 **MS. LEDDEN:** Okay.

20 **THE COURT:** For the moment what I would like to know
21 is just this distinction between Janssen patients or patients
22 on Janssen therapies and not on Janssen therapies. Does
23 what -- I'm going to say this wrong -- Mr. LoBiondo, okay,
24 said, is that you how you understand the distinction that was
25 drawn by the Court as well, as to data -- damages-related data

1 we're talking about. You don't have to -- no one has to
2 produce things related to non-Janssen therapies, but as to
3 possibly communications, they might not all say specifically
4 Johnson & Johnson or Janssen, but they might still be
5 discoverable; is that how you understand it?

6 **MS. LEDDEN:** This is how I understand it, Your
7 Honor, yes.

8 **THE COURT:** Okay, terrific. Thank you. I will
9 definitely let you speak to the burdensome. I think that's
10 RFPs 28 through 30 here?

11 **MS. LEDDEN:** Yes, it is, Your Honor.

12 **THE COURT:** So we'll probably get to that in a
13 while, yeah. Okay. All right. So I mean, to give you all a
14 preview of what I'm hoping to do, I'm hoping to give you as
15 many rulings as I can today right here, but I may not be able
16 to give you all of the rulings for the reasons that we've
17 already seen that some of these issues are still being
18 litigated. And if another court needed supplemental briefing
19 to deal with it, I am not arrogant enough to suggest that I
20 will definitely be able to rule on it without such briefing,
21 but we'll just see how that goes. All right.

22 So moving on then, so it sounds like the parties are
23 in agreement, anyway, about how that rule about the -- the
24 qualification of the data is to be implemented, so I hope you
25 can remain in agreement about that and we don't have to

1 discuss it again.

2 All right. The issue then for us today, issues, are
3 RFPs 3 through 30; 3, subsections (ii) and (iii), and so I'm
4 just going to go through them, at the risk of being tedious.
5 I don't know of any better way to make sure that I am
6 addressing everything that you've asked. Give me one moment,
7 please.

8 All right. We're not going to have ten minutes of
9 argument on each one. I'm going to maybe ask some questions,
10 and then I'm going to give you a ruling. That's going to be
11 the way this goes.

12 Okay. All communications between -- so number (i)
13 is gone.

14 All communications between Express Scripts and
15 another entity about SaveOnSP or communications internally at
16 Express Scripts about SaveOnSP, including any communications
17 concerning manufacturer copay assistance programs and
18 SaveOnSP's negotiations with Express Scripts related to the
19 SaveOnSP program.

20 That's the request that we're talking about. What I
21 would like to know from Express Scripts, is it your position
22 that those two things could be obtained from SaveOn?

23 **MS. LEDDEN:** That's part of it, Your Honor. I mean,
24 there are kind of three points here that the judge in
25 Tennessee also made. It's duplicative of other requests in

1 the subpoena.

2 **THE COURT:** Yeah, I wondered about that. Which ones
3 is it duplicative of?

4 **MS. LEDDEN:** Request 6, and there is -- sorry, Your
5 Honor. I mean, Request 6 is the most notable, Your Honor.

6 **THE COURT:** Okay. So that one is about between
7 Accredo and Express Scripts?

8 **MS. LEDDEN:** Oh, and 13 as well, Your Honor.

9 **THE COURT:** Okay, give me one second before you move
10 on. You're saying that the request for all communications
11 between Express Scripts and another entity is duplicative of
12 the communications between Accredo and Express Scripts; right?

13 **MS. LEDDEN:** Yes, Your Honor, partially.

14 **THE COURT:** Okay. All right. So I would say,
15 though, I mean, reading them just on their face it sounds like
16 Number 6 might be a subset of number 3, not vice versa; right?

17 **MS. LEDDEN:** Yes.

18 **THE COURT:** And then Number 13?

19 **MS. LEDDEN:** Number 13 is the marketing or
20 promotional --

21 **THE COURT:** Promotional materials.

22 **MS. LEDDEN:** Yes, Your Honor.

23 **THE COURT:** You think that Number 3 is a subset of
24 number 13?

25 **MS. LEDDEN:** Yes.

1 **THE COURT:** Marketing or promotional materials would
2 include, in your view, all communications between Express
3 Scripts and another entity about SaveOnSP?

4 **MS. LEDDEN:** I'm sorry, Your Honor. I would flip
5 that. I'm sorry. I would say that those marketing materials
6 would be a subset of those communications.

7 **THE COURT:** I see.

8 **MS. LEDDEN:** Yes. Because our marketing materials
9 would not be to patients. They would be to entities.

10 **THE COURT:** Okay. So they would necessarily be
11 included in communications? Like you would never have just
12 marketing material. I guess if you're talking about
13 internally about Express Scripts, about SaveOnSP, that --
14 those internal communications would be, would encompass
15 marketing materials that hadn't been distributed outside the
16 company?

17 **MS. LEDDEN:** Yes.

18 **THE COURT:** Okay. Let me hear from Mr. LoBiondo.

19 **MR. LOBIONDO:** Your Honor, I think there probably is
20 overlap here. I think to your points, a request about all
21 marketing materials, you know, some of those might be in
22 communications but some of those might not; right? So a draft
23 of a marketing material, a draft of a Power Point, you know, I
24 don't know that that's a communication. If it then gets sent
25 to somebody, it becomes a communication, so I don't want to

1 belabor the point or be over-technical. I think there is some
2 overlap, but also Request 13 is one of the ones I believe that
3 was granted by the Accredo Court.

4 **THE COURT:** Right, but I think he denied something
5 analogous to Requests No. 3, subset (ii) and (iii), but again,
6 I'm happy to hear arguments for or against whatever it is the
7 other Court did.

8 So Ms. Ledden, then, I take your point that there's
9 some overlap. What other -- you said there were three points.

10 **MS. LEDDEN:** One, they're impermissibly general, so
11 we're seeking all documents -- well, in this case all
12 communications, and while they're narrowed to some extent by
13 topical matter, this isn't a situation where we're looking at
14 documents that are contained in a database and we can easily
15 search.

16 This is, additionally, the third point, a burden
17 issue. So any interactions regarding the SaveOn program, so
18 again, Express Scripts primarily interacts with clients, which
19 are these plans, right, essentially insurance companies. The
20 insurance companies then have an account representative at
21 Express Scripts, and there are account representative teams.
22 And there are hundreds, if not thousands, of those
23 individuals. And this is a program that is offered, in my
24 understanding, as a regular course.

25 So if we're looking for any and all communications

1 regarding that, I mean, it's not -- it's not something that we
2 can feasibly do.

3 **THE COURT:** Have you proposed sensible
4 qualifications or narrowing of that?

5 **MS. LEDDEN:** Well, we did as it relates like to
6 Request 13. Speaking of it as a subset, this morning we had a
7 good conversation with opposing counsel and suggested that we
8 would go back to our client and look into whether or not we
9 could produce some noncustodial sheets, so marketing materials
10 that may be branded generally regarding the SaveOn program
11 that then would have been used by account managers to
12 communicate the basis of that program to these clients. So
13 that was one way.

14 And then, let me see if there was others. Oh, so --
15 and then when we're talking about Request No. 6, any
16 communications we offered, again, we're talking about
17 thousands of -- tens of thousands of plans; right? We have
18 tens of thousands of clients. We said, hey, if you find a
19 communication or you have, suspect in your prior productions
20 from Accredo or to be produced from Accredo prior production
21 from SaveOn, something that keys, a, hey, we believe there
22 have been some important communications regarding, I don't
23 know, Blue Cross Blue Shield, would you look for
24 communications from Blue Cross Blue Shield from a specific
25 time period regarding SaveOn; we're more than happy to look

1 into that.

2 An additional problem in that is that our account
3 managers move around frequently, so we're not just looking at
4 like one custodian for Blue Cross Blue Shield. Sometimes
5 during the period they can have several different account
6 managers who may have discussed a matter. All that is to be
7 said, you know, we're willing to work with them in that
8 respect if they can identify some troubling communications or
9 communications, rather, that they think are relevant, we're
10 happy to look into them further.

11 **THE COURT:** Okay. Was there an analogous request
12 from Accredo to Number 6? I mean, I notice Number 6 is about
13 Accredo. Did they ask Accredo for those same communications
14 between Accredo and Express Scripts?

15 **MS. LEDDEN:** Yes, Your Honor. There is an analogous
16 request, and the judge found that it was targeted towards
17 Accredo and Express Scripts' direct involvement. My
18 understanding from subpoena counsel, or Accredo's counsel, is
19 that they intend to produce responsive documents to those
20 requests, and they're in further negotiations. Mr. LoBiondo
21 might have more to add to that specifically.

22 **THE COURT:** Yes, Mr. LoBiondo, you can respond to
23 any aspect of this that you wish.

24 **MR. LOBIONDO:** Thank you, Your Honor, and I'll take
25 it sort of last thing first. So, yes, the analogous request

1 was granted by the Tennessee Court, but they're analogous but
2 they're not necessarily overlapping, right, because the second
3 part of RFP 6 is about internal ESI communications. To be --
4 the Court considering the Accredo subpoena granted both
5 aspects of the analogous request. So we're going to get,
6 hopefully, internal documents among Accredo discussing Express
7 Scripts, but we're not -- those are internal documents to
8 Accredo, right, so they're not going to be overlapping.

9 **THE COURT:** I see that Number 2 would not have been
10 produced by Accredo.

11 **MR. LoBIONDO:** Right. And then just to kind of
12 address the broader points on Request 3, you know, I think
13 this is, as I understand their position today, it is mostly
14 about burden. Before today there was no offer to do anything
15 on Request 3 or Request 13, and as I understood what counsel
16 was saying, she said we're going to look and see if there are
17 some templates or they're noncustodial.

18 So the proposal is still from ESI about the burden
19 of producing custodial documents is that they're not going to
20 produce custodial documents. And we don't want them -- we're
21 not asking the Court to compel them to have 500 custodians,
22 which they say they have 500 employees working on this scheme.

23 On the other hand, the fact that they have 500
24 employees working on the scheme gives you a sense of, A, the
25 investment that they have in the SaveOn program and the

1 relevance to the underlying litigation. The litigation is
2 alleging at bottom that the entire SaveOn program is a
3 violation of our terms and conditions and has cost us a
4 hundred million dollars.

5 So when Your Honor asks have you proposed something
6 to winnow that burden, I suppose saying we're not going to
7 produce any custodial documents at all is a proposal, but in
8 the ordinary course what would happen is they would say, we're
9 not going to add 500 custodians. We're willing to search
10 these accounts. We're willing to -- you know, something
11 that's not just a pretext where we shouldn't have to produce
12 anything at all. And that has not been forthcoming.

13 **THE COURT:** Okay. Ms. Ledden.

14 **MS. LEDDEN:** May I respond to that? A couple notes.
15 One, Express Scripts is not involved in this scheme in any
16 way. We work for our clients.

17 Two, as I understand it from our discussions this
18 morning and what Mr. LoBiondo just said now, is that there
19 is -- I think they have a misunderstanding about how this
20 works. It's not a situation where there's a dedicated SaveOn
21 team, right, so there wouldn't be like a manager over like
22 SaveOn products that, that isn't at Accredo; there's somebody
23 at Accredo that does some of that.

24 But at Express Scripts that's not how it works. Our
25 interactions, it's a portion of a plan design, and so then

1 we're looking at each individual account manager. It's not
2 something that, you know, we could propose five, ten people
3 and then do a limited search of those five or ten people.

4 And then, additionally, I would like to note as it
5 relates to the video that's another one of their requests, we
6 did discuss this morning producing e-mails from Rachel Harmon,
7 so that would be a custodian at Express Scripts that we intend
8 to -- we're looking into her e-mails now.

9 **THE COURT:** Okay. So you have not -- to that extent
10 you've offered a custodian? Yes.

11 **MS. LEDDEN:** One, yes. It becomes challenging, Your
12 Honor, because they all have that similar role where it's very
13 general. It's not like we're able, again, to find one person
14 that has some sort of supervisory authority and maybe all
15 e-mails flow through that person.

16 But, again, if there is communication out there,
17 they find something, they've gotten maybe something escalated
18 to SaveOn or Accredo, we're happy then to look at that person
19 for that time period about those issues, absolutely.

20 **THE COURT:** Mr. LoBiondo, do you have anything on
21 the basis of which you could identify communications between
22 Express Scripts and other entities about SaveOnSP that you're
23 particularly interested in?

24 **MR. LOBIONDO:** Respectfully, Your Honor, we don't
25 have really the information about how ESI works. We have

1 their attorney representations, but we don't have
2 organizational charts. They have not engaged with us in this
3 process at all.

4 So obviously, we don't want to ask for something
5 that's a legitimately undue burden, but it's also not our job
6 to say, okay, well, we're going to find this other thing from
7 the SaveOn production and then ask you about it because what
8 they're going to say next is, You have it from the SaveOn
9 production; you don't need it from us.

10 So Rachel Harmon, I'm glad to hear they're going to
11 add Rachel Harmon as a custodian, but that's one account rep
12 doing one presentation, and the reason we know about that
13 presentation is because they accidentally put it on the
14 Internet and exposed the whole scheme.

15 I also don't want to, you know, belabor the point or
16 go back and forth because I think Your Honor has very clearly
17 read the briefing. So the idea that ESI is not a part of the
18 scheme, I don't want to spend five minutes arguing about it,
19 but I think it's very obvious they're making money from the
20 scheme and all that.

21 **THE COURT:** Right; there's no need. I understand
22 Express Scripts' role both in the litigation or lack thereof
23 and the allegations of its involvement in the scheme. All
24 right.

25 So I do think communications between Express Scripts

1 and other entities and also internal communications about
2 SaveOnSP are relevant to the litigation, and it's very hard
3 for me, just like for the reasons that you're suggesting,
4 Ms. Ledden, to carve that up into a smaller request that
5 they're allowed to make.

6 Normally that would be taken care of between the
7 parties who know about what's going on in those entities and
8 can work together to find a mutually agreeable resolution to
9 the issue that you're raising.

10 But I am not going to deny them discovery of these
11 communications, and the -- sorry -- both between Express
12 Scripts and other entities and internally because I don't
13 know, I have not heard why SaveOn might have produced anything
14 that falls into either one of those categories, and I'm not
15 sure how they would get what you're suggesting, Ms. Ledden,
16 which is sort of leads from other -- that all seems very
17 abstract to me that they might be able to find something else
18 that they want to target a specific RFP to. They may well be
19 able to do that, but I'm not clear how, and this is, I think,
20 a reasonably tailored request for communications, unless and
21 until I have a motion for a protective order based on the
22 specific burden involved in this particular request.

23 So that motion to compel as to Request No. 3,
24 Sections (ii) and (iii), is granted.

25 And maybe we should discuss 6 and 13 since we've

1 already broached them. Although, I worry about my ability to
2 remember which things we've talked about if we don't go
3 systematically through them. Maybe we'll come back to them.

4 We'll go to Number 4, Documents and communications,
5 the extent to which Express Scripts is involved with enrolling
6 patients. This also is -- seems likely to provide the
7 underlying case with information regarding the operation or
8 nonoperation of the alleged scheme. That's from the Western
9 District of Tennessee case, which I know is not authoritative
10 on me, but that is a reasonable summary of why it would be
11 discoverable.

12 And, you know, that's certainly alleged that ESI has
13 played a significant role in the SaveOnSP program, and so
14 documents and communications showing that they, how they have
15 been involved with enrolling patients into it are fair game,
16 it seems to me, so that motion to compel will also be granted,
17 again, subject -- if you can make arguments about specific
18 burdens that Plaintiff's counsel is inflexibly unwilling to
19 accommodate in the production of these materials, obviously I
20 would entertain those on a specific concrete basis.

21 **MS. LEDDEN:** May I just indicate, we don't have
22 responsive documents.

23 **THE COURT:** Oh, well, then I don't know why we're
24 talking about it. There's nothing about -- no responsive
25 documents about the extent to which Express Scripts is

1 involved with enrolling patients; yes? They've searched for
2 all such documents and found none?

3 **MS. LEDDEN:** We are not involved in enrolling
4 patients.

5 **THE COURT:** Oh, okay.

6 **MR. LoBIONDO:** Your Honor?

7 **THE COURT:** Yes.

8 **MS. LEDDEN:** And we did tell them that today.

9 **MR. LoBIONDO:** This is sort of the frustrating thing
10 with hearing about these things for the first time the morning
11 of argument.

12 **THE COURT:** Okay.

13 **MR. LoBIONDO:** I would say that the attorney
14 representation has been made. We think the request should be
15 granted and they should do a -- they should do a search; they
16 should interview their client. If it turns out there's
17 nothing, there's nothing obviously, but the reasons for
18 nonproduction have been shifting, and so it's a little bit
19 hard for us to know whether there's no documents or whether
20 they don't see their role the same way we see it. So we think
21 the ruling that it's granted, obviously if there's nothing --

22 **THE COURT:** To the extent it exists, it's granted.
23 If there's -- you can't get water out of a stone, so if
24 there's nothing there, there's nothing there. You know, I'm
25 not going to go to their building and look for the things

1 myself.

2 **MR. LoBIONDO:** Understood, Your Honor.

3 **THE COURT:** Okay. All right, so we'll move on to
4 Request No. 5, Documents sufficient to show the relationship
5 between Accredo and SaveOnSP. It seems to me that this is
6 likely duplicative of information that you are now able to get
7 from Accredo; is that correct?

8 **MR. LoBIONDO:** Your Honor, the analogous request to
9 Accredo was for documents about the ESI/SaveOn relationship.
10 So in other words, we were trying to figure out how all of
11 these entities worked together.

12 **THE COURT:** Right.

13 **MR. LoBIONDO:** So we asked ESI how does Accredo and
14 SaveOnSP work together. And then --

15 **THE COURT:** And vice versa.

16 **MR. LoBIONDO:** And vice versa.

17 **THE COURT:** Right.

18 **MR. LoBIONDO:** So they are analogous, but I don't
19 believe -- actually, the Accredo Court denied the request.

20 **THE COURT:** Because it was about ESI.

21 **MR. LoBIONDO:** Because it was about ESI.

22 **THE COURT:** Right. And so what I'm asking is why
23 wouldn't I do the exact same thing because now you have
24 information from Accredo about its relationship with SaveOn,
25 and so, I mean, starting from just the wording of the request,

1 it's unclear to me how this would not be covered by
2 information you're going to get from Accredo and SaveOnSP.

3 **MR. LoBIONDO:** So what I would say to that very
4 briefly, Your Honor, is we don't have anything from Accredo
5 yet. Accredo has already moved for reconsideration of aspects
6 of those orders. Accredo has the same, in some respects, the
7 same counsel that we were negotiating with with ESI, not
8 counsel that's here, but I guess it's subpoena counsel.

9 **THE COURT:** Okay.

10 **MR. LoBIONDO:** So they are playing a lot of the
11 same -- I shouldn't say playing the same game. They're taking
12 the same positions. We haven't seen anything from them yet,
13 and we don't know what they're going to get. So I just am
14 worried about saying, yes, we're definitely going to get it
15 from Accredo and then we don't and we don't have it from
16 anybody.

17 **THE COURT:** Can you explain to me your understanding
18 of the relationship between Accredo and ESI with respect to
19 the SaveOn -- please focus on, so why would I think or you
20 think that Express Scripts is in -- you know, has documents
21 that reflect the relationship between Accredo and SaveOn?

22 **MR. LoBIONDO:** So ESI is Accredo's parent, and ESI
23 is the one that's signing up the plans for the SaveOn program.
24 For ESI to do that, my understanding is that ESI pitches the
25 SaveOn program to its client plans. A big part of that pitch

1 is -- you know, part of it is here's how we redesignate the
2 drug so that we can inflate the copay, but there's also a
3 whole discussion of how Accredo forces a rejection of the
4 prescription at the pharmacy level so that the patient
5 effectively is forced into, into signing up for the SaveOn
6 program because otherwise they're not going to get their
7 cancer medication or whatever it is.

8 **THE COURT:** There was a diagram in the brief about
9 this; correct?

10 **MR. LoBIONDO:** Exactly. So ESI indisputably, not
11 just because Accredo is a subsidiary and its own specialty
12 pharmacy, but also because ESI is in the business of selling
13 this program, it definitely has information about the Accredo
14 role in the program. We do have some information from SaveOn;
15 obviously we have custodial productions from SaveOn. But
16 SaveOn is outside of the ESI/Accredo corporate structure, so I
17 don't think those productions are duplicative.

18 **THE COURT:** Okay. But whether or not it's
19 duplicative of anything you might get from Accredo, you don't
20 know yet?

21 **MR. LoBIONDO:** It's impossible to say.

22 **THE COURT:** Yeah, okay. All right. I am going to
23 deny the motion to compel that information unless and until
24 counsel can come with some basis on lack of production from
25 Accredo or some other reason why they would need to have this

1 third party produce information about another third party
2 because they couldn't get it from them themselves.

3 All right. Communications between Accredo and
4 Express Scripts. This is the one we've already discussed to a
5 certain extent. The internal part of this, which I take it
6 couldn't be obtained from someone else, unless someone can
7 tell me something different about the word internal than I'm
8 reading it, then I think should be granted. And then as it
9 is, again, tailored to the role with respect to the SaveOnSP
10 program.

11 So I am not suggesting that Express Scripts should
12 have to produce every document that says the word Accredo in
13 it to the plaintiffs, but as described, it seems designed to
14 produce relevant information to the underlying litigation.

15 And for the first one between Accredo and Express
16 Scripts and concerning each entity's role in administering the
17 SaveOnSP program, it's hard to know what to do with that
18 because that's the kind of thing that if you were getting it
19 from one, you wouldn't necessarily need it from the other.
20 You have been ordered by a Court to get it from Accredo;
21 correct?

22 **MR. LoBIONDO:** Yes, the Court in Tennessee granted
23 that request.

24 **THE COURT:** Granted that, yeah, as to Accredo. So
25 in as much as they're part of the same, you know, corporate

1 structure and they have the same counsel, I don't know that I
2 need to order both of these entities to produce the same
3 quantity of information, but if obviously you don't get it
4 from Accredo, I will hear a motion to reconsider that ruling.

5 So I'm going to deny the motion to compel as to the
6 first part, but I know, Ms. Ledden, you don't represent
7 Accredo or I'm hearing -- that's what I'm hearing, but if you
8 know people who do, if you could let them know that if they
9 don't produce things that are responsive to this, then you are
10 likely to have to. I don't know how that will affect their
11 behavior or yours, but you can communicate that fact to them.

12 All right. Then Request No. 7, documents sufficient
13 to show Evernorth's role in administering the SaveOnSP
14 program. Express Scripts, what is your relationship to
15 Evernorth?

16 **MS. LEDDEN:** Evernorth is a parent. And so I just
17 want to clarify too, we are not a parent company for Accredo.

18 **THE COURT:** Okay. Are you part of the same --

19 **MS. LEDDEN:** We're all part of CIGNA. So CIGNA is
20 the big parent and we're down below, so yes, I mean, our role
21 is working with clients on plan design. Evernorth is our
22 parent.

23 **THE COURT:** Your parent, which is a part of CIGNA
24 still?

25 **MS. LEDDEN:** Yes.

1 **THE COURT:** Okay. So you're all -- okay. And then
2 let me ask Mr. LoBiondo, why do you need information about
3 Evernorth?

4 **MR. LOBIONDO:** Yes, so this is a document sufficient
5 to show, so this was part of us trying to figure out what
6 is --

7 **THE COURT:** The structure.

8 **MR. LOBIONDO:** Yeah, what the role is and, you know,
9 if it's one document, it's one document. This is not like
10 we're asking for every e-mail.

11 **THE COURT:** Okay. So this is not a scorched earth,
12 give us everything about Evernorth that's in ESI's files.

13 **MR. LOBIONDO:** Correct. We were trying to draw a
14 distinction between some requests that say all documents and
15 ones that say sufficient to show. In my view, that can be a
16 contract, if there's one contract or nothing.

17 **THE COURT:** Okay. And if there's nothing, then
18 there's nothing.

19 **MR. LOBIONDO:** And if there's nothing, but that
20 bespeaks, you know, there has to be some investigation; there
21 has to be talking to the client.

22 **THE COURT:** Right.

23 **MR. LOBIONDO:** There has to be some due diligence.

24 **THE COURT:** Okay. And Ms. Ledden, what is the
25 objection to this particular request?

1 **MS. LEDDEN:** I mean, Evernorth obviously is a
2 separate entity, one. Two, are we talking about just
3 documents in Express Scripts' possession? Because when
4 discussing this or reviewing this, it seems to be seeking more
5 than that, you know, because of the nature of our
6 relationship.

7 **THE COURT:** More than what exactly?

8 **MS. LEDDEN:** Like documents from Evernorth.

9 **THE COURT:** Right.

10 **MS. LEDDEN:** Right.

11 **THE COURT:** Well, these -- I mean, they're asking
12 Express Scripts, so if they're asking you to go to Evernorth
13 and get documents, that's another -- as I understand the
14 relationship, my very limited understanding of it, that would
15 be asking for yet another third party's documents; correct?

16 **MS. LEDDEN:** Exactly.

17 **THE COURT:** Okay. So you would object to producing
18 something from Evernorth?

19 **MS. LEDDEN:** Yeah, and my understanding from my
20 co-counsel here is that we wouldn't have that? I'm sorry.

21 **MS. HELLMANN:** Certainly we will check to see if
22 Express Scripts has documents relating to Evernorth's
23 involvement on SaveOnSP. We are not going to go to Evernorth
24 to see what documents they have. I mean, these are very
25 separate corporations.

1 **THE COURT:** Sure.

2 **MS. HELLMANN:** There are firewalls in place.

3 **THE COURT:** If they want to subpoena Evernorth, they
4 can subpoena Evernorth.

5 **MR. LOBIONDO:** We've never asked them to ask.

6 **THE COURT:** Good. Everybody is in agreement, and
7 I'm granting the motion to compel on RFP Number 7, subject to
8 the qualifications we've all agreed to here today.

9 Let's move on. Request No. 8, all documents
10 concerning the Master Program Agreement, and I understand, at
11 least I thought I understood from the Tennessee order, that
12 the agreement itself has been produced; correct?

13 **MR. LOBIONDO:** That's correct; the final agreement
14 SaveOn produced.

15 **THE COURT:** Okay. So you don't need the agreement
16 itself, but you are still seeking all of the rest of the
17 things that are described there: Drafts, amendments,
18 schedules, exhibits, appendices, documents concerning any
19 predecessor, successor, from Express Scripts? Are you seeking
20 those things?

21 **MR. LOBIONDO:** Internal documents that SaveOn can't
22 produce about this core contract that is -- sets out the
23 entire framework for the program. And 9, just to maybe keep
24 things moving, Requests 8 and 9 are similar in this regard.
25 They're different contracts because they cover different time

1 periods.

2 **THE COURT:** Okay.

3 **MR. LOBIONDO:** But these are contracts about how the
4 SaveOn program is going to be administered and the division of
5 labor between ESI and SaveOn, and so SaveOn gave us the
6 contracts, but I assume that somebody at ESI talked about the
7 drafts of the contracts.

8 **THE COURT:** Okay.

9 **MR. LOBIONDO:** If those materials are not
10 privileged, we would like to see those drafts and those
11 communications.

12 **THE COURT:** Okay. So you acknowledge that they
13 might be privileged, something might be privileged?

14 **MR. LOBIONDO:** I'm sure that a lawyer looked at
15 something at some point, and we would not be asking for a
16 lawyer's comments, but this is a business, so there's going to
17 be nonprivileged documents.

18 **THE COURT:** Other kind of communications, okay.

19 Ms. Ledden?

20 **MS. LEDDEN:** I mean, that was going to be my first
21 point, Your Honor. Any drafts involved in this process are
22 likely privileged, one, and then two, we have trouble seeing
23 the relevance here because our internal communications
24 regarding the program don't address the underlying issues,
25 which are the potential inducement of the SaveOn program on

1 these patients.

2 **THE COURT:** Okay, let me try to think about that.
3 The documents related to the contracts don't reflect on the
4 fundamental issue, which is, again, the inducement to
5 patients, you said?

6 **MS. LEDDEN:** Yes, of patients to violate their
7 contracts with J&J.

8 **THE COURT:** Right. Okay. Mr. LoBiondo?

9 **MR. LOBIONDO:** Yeah, I think -- well, in this and
10 perhaps some other requests, we're just going to have a very
11 different view of relevance.

12 **THE COURT:** Okay, yeah.

13 **MR. LOBIONDO:** So the scheme, the scheme is the
14 scheme, and obviously the final contract is relevant to that.
15 But if there was back and forth between ESI and Accredo --
16 between ESI and SaveOn about what ESI's role was going to
17 be -- and maybe it changed throughout the drafts of the
18 agreement -- or ESI saying I'm not comfortable with that or
19 SaveOn saying I'm not comfortable with that, all of that goes
20 to the wrongfulness element under tortious interference, and
21 all of it goes to the potential patient harm.

22 And we haven't seen the documents, so I'm shooting
23 completely blind, but the core contracts that set out how this
24 scheme is going to work, to me, are, including the drafts,
25 including the conversation that led up to the final

1 memorialization of it, are clearly discoverable because
2 they're going to tell you something relevant about how the
3 scheme works in practice on patients at the patient level.

4 **THE COURT:** Okay. You're not accusing -- when you
5 say the wrongfulness of the scheme, here again, we do not have
6 a defendant, right, in the New Jersey litigation that we're
7 talking about?

8 **MR. LOBIONDO:** Correct. But even if -- so this is
9 just a hypothetical; I'm just making it up. But if, for
10 example, there are communications between ESI and SaveOn where
11 ESI says, You shouldn't do X because that is bad for patients,
12 and then SaveOn does it anyway, we're not alleging that ESI
13 has done anything wrong, but it's evidence that SaveOn has
14 done something wrong; right?

15 And the reason I said wrongfulness is because for
16 tortious interference under the law, the claim in the
17 underlying litigation, it's not enough just for us to show
18 that SaveOn induced patients to breach their contract. There
19 is an additional layer where we have to show either
20 wrongfulness or some, some -- something that's more than just
21 breaking sharp practice.

22 So that's why I said wrongfulness. It's not to cast
23 any dispersions on ESI or anybody else, but there is a sort of
24 motive and an intent aspect to this that the New Jersey Court,
25 when it's been ruling on these discovery requests, has been

1 really struggling with, because, you know, we are not just
2 looking for final copies of things because we need to see that
3 back and forth to be able to have evidence on whether or not
4 we can prove the wrongfulness, and then on the GBL claim, the
5 effect on patients of the program.

6 **THE COURT:** Okay. And speak to me about these two
7 contracts in particular, the eight and nine. Why do you think
8 that Express Scripts specifically might have communications
9 that would reflect on what SaveOn was trying to do in crafting
10 these agreements? I mean, you wouldn't ask for some other
11 entity's, random entity on the street, you know, whether they
12 had anything, any communications related to these agreements
13 and expect them to have evidence of wrongfulness in them. So
14 I'm just asking you to tell me why this is particularly
15 relevant to you.

16 **MR. LoBIONDO:** Okay, I think I got it, and you'll
17 tell me if I'm not saying it correctly or if I'm not answering
18 your question.

19 So the way that patients get sucked into the SaveOn
20 program is that their employers sign up with ESI, ESI pitches
21 them the program, and then my understanding is there is a
22 joinder agreement that is signed as between the plan, ESI, and
23 SaveOn.

24 So ESI is a party to this contractual arrangement
25 that leads to the scheme we have complained of. So we

1 wouldn't ask a random party on the street because the random
2 person on the street doesn't have anything to do --

3 **THE COURT:** Right.

4 **MR. LoBIONDO:** -- with the implementation.

5 **THE COURT:** So they're involved in the overall
6 program, so random on the street wasn't a good example, but
7 this Master Program Agreement, that's between Express Scripts
8 and SaveOn; right?

9 **MR. LoBIONDO:** It is.

10 **THE COURT:** Okay. So that's why you're asking about
11 whether Express Scripts has --

12 **MR. LoBIONDO:** Yes.

13 **THE COURT:** What is it about the Master Program
14 Agreement that makes it the case that you think that
15 communications about it would have, might have evidence of
16 wrongfulness?

17 **MR. LoBIONDO:** Because the program sets out -- I'm
18 sorry. The program agreement sets out each entity's role, and
19 it may be the case that there are some things SaveOn is doing
20 that ESI did not want to do itself; right? ESI, if it wanted
21 to, could have set this program up with one of its
22 subsidiaries. Instead, they're contracting out with SaveOnSP.

23 And you'll see in some of the later requests that in
24 some public-facing materials, ESI says, We're pitching this to
25 you, but we're not making any claims about whether it's legal

1 or not.

2 So if those conversations happened in the context of
3 negotiating the Master Services Agreement, for example, the
4 agreement talks a little bit about indemnity and when ESI is
5 going to indemnify SaveOn and when SaveOn is going to
6 indemnify ESI.

7 So those are conversations that are very relevant to
8 wrongfulness, right, because ESI is deciding under what
9 circumstances are we willing to support and to pay the
10 expenses of SaveOn. So it's those kind of things. Again, we
11 don't know for sure.

12 **THE COURT:** And what about the other agreement, can
13 you tell me what it is?

14 **MR. LOBIONDO:** Sure. So the other agreement --

15 **THE COURT:** 2018 agreement.

16 **MR. LOBIONDO:** Yeah. There's a number of different
17 agreements between ESI and SaveOnSP, and we don't have perfect
18 visibility into which of them apply to which ESI clients. I
19 think there's not a perfect overlap, and some apply to
20 different clients and some apply at different times.

21 But this is the agreement that expressly says -- or
22 one of the agreements that expressly says what it is that
23 Express Scripts is taking a cut for. And they say it's for
24 operational setup and support, member and claims support,
25 program and benefit coordination.

1 So there was presumably some negotiation leading up
2 to this language in this agreement about what ESI was going to
3 do to further the SaveOn scheme, and those conversations are
4 relevant.

5 **THE COURT:** Okay. And the conversations you're
6 talking about, to the extent they're with SaveOn, wouldn't
7 SaveOn have had to produce them?

8 **MR. LoBIONDO:** Yes.

9 **THE COURT:** Okay. So are you seeking here internal,
10 just so these now are limited to just internal documents --

11 **MR. LoBIONDO:** Correct.

12 **THE COURT:** -- and internal communications?

13 **MR. LoBIONDO:** Correct. We've tried to be very
14 clear that if SaveOn has already produced it, we don't need it
15 from ESI.

16 **THE COURT:** Okay. All right. Ms. Ledden, do you
17 want to respond?

18 **MS. LEDDEN:** I mean, my biggest point is the
19 relevance here is on those communications between Express
20 Scripts and SaveOn. Those that presumably SaveOn has already
21 produced, our internal processes or communications regarding
22 that, you know, wouldn't be relevant and then also, you know,
23 would be, I mean, in large part, especially when we're talking
24 about draft contracts, we're looking at privilege issues. And
25 then we encounter some of the same burden situation

1 potentially regarding following up on them.

2 **THE COURT:** Okay.

3 **MS. HELLMANN:** And could I add just one thing on
4 that, Your Honor?

5 **THE COURT:** Yes, Ms. Hellmann.

6 **MS. HELLMANN:** Let's just do a hypothetical. There
7 is an internal business communication from someone at Express
8 Scripts to somebody at Express Scripts that says, huh, I don't
9 know that SaveOn should be doing this. That is not relevant
10 to this, that litigation.

11 At most -- and what counsel talked about for most of
12 his argument was it was Express Scripts told SaveOn they
13 shouldn't be doing this and SaveOn knows; that's all back and
14 forth between Express Scripts, the nonparty, and the party.

15 So even if you get -- let's just assume there's this
16 internal communication of like this doesn't sound good, that's
17 not relevant to what SaveOn knew and what SaveOn did. I mean,
18 that's the communications between the two contracting parties,
19 to which they need to get it from the party, and if that party
20 hasn't produced it, they can follow up, but it's not relevant
here.

22 **THE COURT:** Okay. What is your response to that,
23 Mr. LoBiondo?

24 **MR. LOBIONDO:** I think if ESI people are e-mailing
25 ESI people and saying SaveOn shouldn't be doing this but all

1 the time ESI is signing up more of its clients for the
2 program, in our view injuring more patients and taking tens of
3 millions of dollars every year from JJHCS, I think their
4 internal view is -- to me it's manifestly relevant, so I don't
5 think we're going to agree about whether or not --

6 **THE COURT:** Wouldn't that be relevant to whether
7 Express Scripts is liable to J&J for something?

8 **MR. LOBIONDO:** Yes, but also it's relevant to when
9 we go to a jury and we have to convince them of the element of
10 tortious interference that this conduct was wrongful, we can
11 say -- I mean, again, we're just talking about
12 discoverability, not admissibility.

13 **THE COURT:** Right.

14 **MR. LOBIONDO:** But just for present purposes, even
15 ESI, who was reaping the rewards of this conduct, agreed
16 privately that it was harming patients. That's extremely
17 probative.

18 **THE COURT:** Probative of what ESI thought about what
19 SaveOn was doing?

20 **MR. LOBIONDO:** Probative of whether the conduct was
21 actually wrongful and actually harmed patients. If ESI, who
22 is supposed to be, you know, whose clients are all the plans,
23 has a private view that something it is enabling is wrongful,
24 that is certainly, you know, it's something the jury is
25 entitled to consider or the Court on summary judgment is

1 entitled to consider. It's not just then us saying it's
2 wrongful and SaveOn saying it's not wrongful. SaveOn's own
3 business partner is saying it's wrongful. I also just --

4 **THE COURT:** I'm not sure that I would necessarily
5 care what SaveOn's business partner thought about SaveOn's
6 conduct if I'm evaluating the actual legality of SaveOn's
7 conduct. That seems like it might be -- and especially if you
8 were going to introduce it to a jury, I mean, I would expect
9 to elicit an objection based on distracting the jury or
10 confusing them about what standard they're applying or, you
11 know, providing a legal opinion that they may be unduly
12 influenced by, even though it has actually no weight
13 whatsoever in the court.

14 But your point about admissibility versus
15 discoverability is what I think is salient, the most salient
16 thing in your -- in support of your position. I just --

17 **MR. LOBIONDO:** Can I make one more point on this,
18 Your Honor, very briefly?

19 **THE COURT:** Yes.

20 **MR. LOBIONDO:** So this is a request where there was
21 an analogous request before the Accredo Court, and the Court
22 said, any documents concerning that agreement, so the Court
23 denied the request and said any documents concerning that
24 agreement are likely to be held by the parties that were party
25 to that agreement, namely Express Scripts and SaveOn.

1 **THE COURT:** Right.

2 **MR. LOBIONDO:** So they have argued there we don't
3 have the stuff; Express Scripts has it. And now we're here
4 and they're saying we have it, but we don't want to give it.
5 So --

6 **THE COURT:** Understood. Ms. Ledden, any response to
7 that?

8 **MS. LEDDEN:** I would just go back to the relevance
9 argument, Your Honor. Again, you know, the judge said that
10 these documents would be held by the parties to that
11 agreement, namely Express Scripts and SaveOn. So again,
12 what's relevant in the underlying case here are those
13 communications between Express Scripts and SaveOn to the
14 extent they exist, and we would ask that it would be limited
15 to that in such -- or at least the relevance is limited in
16 that way. As Ms. Hellmann so eloquently put earlier, if there
17 was an internal communication, it's not relevant to their
18 case.

19 **THE COURT:** Yes. If we were talking about
20 admissibility, I would be very much inclined to agree with
21 you, Express Scripts. As we are talking about
22 discoverability, I don't know that I can find that as a, you
23 know, that it's not even discoverable under Rule 26, documents
24 and communications related to these contracts insofar as those
25 contracts are very, very closely related to the operation of

1 this program, and so I'm going to grant the motions to compel.

2 But again, that is subject to any more concrete
3 objections on the basis of burden that Express Scripts wants
4 to make having now the general ruling that this is
5 discoverable information and that they should be responsible
6 for producing it assuming it is not overly burdensome. We
7 don't have those concrete arguments right now, which is one of
8 the reasons it's frustrating to have to rule on this in this
9 context. And so if there is some argument to be made after
10 discussions between the parties in light of today's ruling,
11 then I will hear those later.

12 Yes, Mr. LoBiondo?

13 **MR. LOBIONDO:** Can I just briefly say before we go
14 on to the next one, I think one of our concerns is that
15 substantial completion in the New Jersey litigation is ending
16 soon, and so --

17 **THE COURT:** Yes.

18 **MR. LOBIONDO:** -- depositions are starting soon. So
19 I think it's, you know, I think Your Honor is totally right to
20 say like if there's something specific about burden, like
21 bring it up, but I would ask you to keep us, both parties, on
22 a tight leash in terms of timing because what we can't do is
23 wait eight more months and then we hear, oh, it's really
24 burdensome for us to produce this because at that point
25 depositions will be over.

1 **THE COURT:** I would like nothing better than for all
2 of you to come to an agreement about how to make this happen
3 tomorrow.

4 **MR. LoBIONDO:** And I think we will.

5 **THE COURT:** So I will put deadlines on follow-up
6 briefing to make this happen expeditiously because, as I
7 understand it, you've already sought an extension of discovery
8 and it's been denied; is that correct?

9 **MR. LoBIONDO:** An extension of discovery was
10 granted, so now substantial completion of document production
11 is next month. It was supposed to be in June.

12 **THE COURT:** Okay.

13 **MR. LoBIONDO:** So --

14 **THE COURT:** But from there, you haven't requested
15 from there?

16 **MR. LoBIONDO:** The judge yesterday, I believe,
17 entered a concomitant extension of the other deadlines.

18 **THE COURT:** Okay.

19 **MR. LoBIONDO:** So now document discovery is supposed
20 to be mostly done by next month.

21 **THE COURT:** Okay.

22 **MR. LoBIONDO:** And then depositions are happening
23 October, November.

24 **THE COURT:** Okay.

25 **MR. LoBIONDO:** I think a little bit in December.

1 **THE COURT:** Okay. Yes, in light of how long you all
2 have had to discuss this already, I am not going to be very
3 sympathetic to a request for a lot of time to discuss it more.
4 You should have done it before you came today. You didn't.
5 You're going to need to get it done soon. So if you -- to the
6 extent I'm open to follow-up arguments to this, I would want
7 those to be submitted promptly, which means that you all
8 should engage in very specific and concrete conversations very
9 soon, and I would hope then when you say the document
10 discovery is due, when is that? I know it was in the
11 briefing; forgive me. September something; right?

12 **MR. LOBIONDO:** September 24th.

13 **THE COURT:** September 24th. Today is
14 August 10th. I mean, ideally I would hear objections by the
15 18th and any response thereto by the 23rd. Because I just had
16 a trial collapse that was supposed to be my second half of
17 August, and so you're much more likely to get my attention if
18 you are finished with your briefing before the end of August.
19 So why don't we -- I mean, that means you all have to meet and
20 confer possibly tomorrow or early --

21 **MR. LOBIONDO:** -- better from our perspective, Your
22 Honor.

23 **THE COURT:** Okay. So I'm going to give the parties
24 until the 18th to file any follow-up motions to this and to
25 the 23rd to respond to those so that I can try to get you a

1 response by the beginning of September.

2 **MR. LOBIONDO:** Okay, that's great. And so, just so
3 I understand the procedure --

4 **THE COURT:** We're not done here, but to the extent
5 there's going to be any kind of -- I'm granting the ones we've
6 discussed so far, and so the burden will be on Express Scripts
7 to show burden if they want to have me reconsider.

8 **MR. LOBIONDO:** That was my question. I wanted to
9 make sure that --

10 **THE COURT:** To the ones we discussed so far. There
11 might be other kinds of follow-up briefing that's appropriate,
12 but -- and then the burden is on you, but so far I think we
13 have dispatched through 9. I mean, if you object to any of my
14 rulings on the ones that I've denied, then you can also
15 object. The more you guys object, the less likely it is
16 you'll get a prompt ruling, though, so just bear in mind that
17 the Court's resources are limited.

18 Okay. We're on 10; right?

19 **MR. LOBIONDO:** Yes.

20 **THE COURT:** Okay. All documents concerning the
21 preparation of and the posting of the video presentation.
22 That will be granted for all the reasons that I've already
23 given for the others. I think it is -- first of all, it's
24 very targeted about a very specific thing, and I think it is
25 likely to lead to information regarding -- that's relevant to

1 the underlying case. I believe that's analogous to the ruling
2 in the Western District of Tennessee as well for what it's
3 worth.

4 Request No. 11, all documents concerning drugs for
5 which this -- I'm not even going to read it. You all know
6 what it says. That strikes me as quite broad, and I'm not
7 sure how it's specific to ESI, so perhaps Mr. LoBiondo could
8 help me with that.

9 **MR. LOBIONDO:** Sure, Your Honor, and maybe I'll
10 start with the end of it. So changes to the SaveOnSP program
11 is based on the, quote, most lucrative copay assistance
12 programs, end quote. So that is a quote, Your Honor, from
13 their video.

14 **THE COURT:** Okay.

15 **MR. LOBIONDO:** So they are out in the market making
16 representations about, you know, when they're selling, when
17 ESI is selling to ESI's clients, they're saying we're making
18 these changes based on the lucrativeness of the copay
19 assistance programs, a/k/a, our program. So they're making
20 these statements out in the market, and we assume that they
21 have some communications, not just with SaveOn but also
22 internally because they're the ones giving the presentations
23 about what it is they're telling to their clients, so that's
24 what this --

25 **THE COURT:** That's for Number 4?

1 **MR. LOBIONDO:** I think all of these are in the same
2 family. It's documents where they are talking about our
3 CarePath copay assistance program and how it can be, in our
4 view, exploited. Obviously they wouldn't say it that way.

5 **THE COURT:** Right. How it interacts with the
6 services that they're providing.

7 **MR. LOBIONDO:** Correct. And how they're targeting
8 our drugs because we have a relatively -- we have a very
9 generous copay assistance program, and so that's what put the
10 target on our back.

11 **THE COURT:** Okay. So this is implicitly limited to
12 documents that are within ESI that are not duplicative of
13 communications from outside; correct?

14 **MR. LOBIONDO:** Everything I say today we don't want
15 anything that's duplicative of what SaveOn has already
16 produced.

17 **THE COURT:** Okay. Okay, Ms. Ledden or Ms. Hellmann?

18 **MS. HELLMANN:** Your Honor, yeah, sorry, I know we're
19 switching up on you.

20 **THE COURT:** It's fine. It's fine.

21 **MS. HELLMANN:** Express Scripts doesn't put the drugs
22 on this list. We don't create this list. So I think it's
23 exactly why the Court denied it in Tennessee, that this is in
24 SaveOn's possession, the drugs on the list, why those drugs
25 may change. I mean, you're taking a statement from video and

1 being like, well, Express Scripts must have internal
2 communications on this as to why they put drugs on.

3 I mean, this is a fishing expedition. The person
4 who made the statement, Rachel Harmon, we are pulling her
5 e-mails. I don't know where we would even start to look for
6 this information. I mean, it's just like Express Scripts may
7 offer, you know, a program to its clients with like drug
8 interactions, if you go into a pharmacy and you're going to
9 get too many drugs that interact; this is that program. It is
10 a program, and it's not -- I mean, rhetoric aside, but it's
11 not like somewhere where these people are like here's the
12 SaveOnSP program. It's just across the book of business.

13 So, one, I don't even know where we would start, but
14 this is information that is in SaveOn's possession. It
15 certainly should be with respect to the drugs, the changing of
16 the drugs.

17 So I think it's all the reasons that it was denied
18 before, and there's -- it is incredibly burdensome, and it's
19 not even to be able to articulate burden; it's more of like
20 I'm not sure where we would go to start. I've worked for
21 Express Scripts for a lot of years, and I know how they're set
22 up, and I wouldn't know what to tell them to go look for these
23 documents.

24 **THE COURT:** Okay. Could they look for documents
25 relating to CarePath? That's a distinctive signifier of the

1 information that they're seeking; right?

2 **MS. HELLMANN:** Because the same thing, I mean, this
3 is part of the program that is offered, and the communications
4 fall within all of the account teams. It is not a place -- I
5 mean, to look for these terms you have to know who the
6 custodians are to look for the terms, and it's not a few
7 individuals. And I mean, certainly -- and this has been
8 referred to of hoping that we do our due diligence. Of course
9 we will do our due diligence, everything the Court tells us to
10 do. We will confirm that does CarePath help this.

11 But I am representing to the Court today I don't --
12 I'm positive that I don't think -- I'm positive I don't
13 think -- I don't think they're housed in one place. And I
14 think it literally would be almost impossible, and I am more
15 than happy to go back and confirm and see if there is a place
16 that we can search.

17 **THE COURT:** Okay. So let me ask, when you say
18 you're producing, you're searching Rachel Harmon, she's the
19 person who put together the video presentation?

20 **MS. HELLMANN:** Correct, Your Honor.

21 **THE COURT:** Okay. And you're going to produce
22 communications related to the putting together of that video
23 presentation?

24 **MS. HELLMANN:** Correct.

25 **THE COURT:** And if there is something that goes, in

1 her communications that goes to where she's getting this idea
2 that it's going to be changed according to the most lucrative
3 copay assistance programs, etc., that would be produced;
4 right?

5 **MS. HELLMANN:** Absolutely.

6 **THE COURT:** Okay. So all right, Mr. LoBiondo, do
7 you want to respond before I rule on this?

8 **MR. LOBIONDO:** Just very briefly, Your Honor. I
9 mean, I think, to the observation you have made several times,
10 when we served the subpoena, they didn't say, Oh, we would
11 love to comply, but it's really hard for us to figure out how
12 to do it. So we first heard, you know, you shouldn't even be
13 talking to us for another six months, and then we heard
14 there's no relevance, the burden.

15 So, you know, the fact that they may have a lot of
16 documents and they may have a lot of people that work on these
17 programs, you know, we would have been happy in January, in
18 February, in March, to sit with them and say, this is how we
19 think we can work out custodians; send us some more charts;
20 we'll send you some names of people.

21 But the fact that that didn't happen, you know, it's
22 interesting to hear these objections now, but to me it feels a
23 little bit pre-textual because if that was really the issue
24 was just that they didn't know how to do it, we could have had
25 that discussion. We wouldn't need to be wasting Your Honor's

1 time. That's all I'll say on it.

2 **THE COURT:** Okay. Does the video presentation
3 mention CarePath in particular?

4 **MR. LoBIONDO:** No. It is a program about
5 manufacturer copay. No.

6 **THE COURT:** All right. I'm going to deny Request
7 No. 11, and I'll say that that is subject to the
8 representations made by Express Scripts that there's going to
9 be information related to that presentation, including
10 Ms. Harmon's information, produced such that if then something
11 in that information gives rise to a further, more tailored
12 request, I might be open to entertaining a motion to compel
13 related to that request.

14 I do think there's something in this universe,
15 Request No. 11, that would definitely be discoverable, and,
16 you know, it's just Request No. 11, and I know I've granted
17 some that I don't know how general or how specific you can be,
18 but on Request No. 11 it does seem to me that it may be quite
19 duplicative of information that is already produced by SaveOn.
20 I don't know that for sure, but it strikes me as possible.
21 And that the -- and that it also may be something that's best
22 pursued going from the narrow information about the
23 presentation more broadly rather than asking Express Scripts
24 to start from these very general categories.

25 So I'm going to deny that as overbroad and

1 potentially duplicative at this time until further notice from
2 the plaintiff. All right?

3 Request No. 12, point-of-sale claim rejection at
4 pharmacies. This is the process that you're saying that leads
5 to them feeling that they must enroll in this program;
6 correct?

7 **MR. LoBIONDO:** Yes; these are more quotes from the
8 ESI presentation.

9 **THE COURT:** And is that the kind of thing that ESI
10 has, or is that the kind of thing that Accredo has?

11 **MR. LoBIONDO:** Well, Accredo is certainly the party
12 that is on the ground doing the actual rejecting. But I don't
13 think it follows that ESI, therefore, doesn't have documents
14 about it, again, especially because they're going out to the
15 market and saying this is what this program does that we're
16 selling to you.

17 **THE COURT:** Okay. Let me hear from Ms. Ledden about
18 that.

19 **MS. LEDDEN:** We discussed this this morning, Your
20 Honor. We do not have documents responsive to this request.
21 We're not involved in the point of sale, in point-of-sale
22 rejections.

23 **THE COURT:** Okay. Well, it seems that it would be
24 relevant if they did, and so I'll grant the motion to compel,
25 and defense can respond to it that they have no documents if

1 that is correct.

2 Okay. Number 13, marketing and promotional
3 materials related to SaveOnSP; I think that is, it seems to
4 me, manifestly relevant. I know there's an "all" at the
5 beginning of the request, and so if there's some argument to
6 be made in very concrete terms that that is overbroad, I will
7 hear that argument by next Friday. But barring that, I don't
8 think -- it seems to me it's tailored to the SaveOnSP program,
9 which is the, obviously the program that's in dispute, and so
10 I'm going to grant the motion to compel.

11 And the same -- for the same basis I'm going to
12 grant Number 14.

13 Number 15, Documents sufficient to identify every
14 health plan and employer that has contracted with Express
15 Scripts to participate during the time period.

16 Mr. LoBiondo, you seem to anticipate that I need you
17 to say something about that.

18 **MR. LOBIONDO:** I think we can hold this one in
19 abeyance, Your Honor, because SaveOn has produced some of this
20 information.

21 **THE COURT:** All right.

22 **MR. LOBIONDO:** So hopefully we won't need to bother
23 ESI with it.

24 **THE COURT:** Okay, let's hold that in abeyance.
25 Terrific. More comments like that from anyone who wants to

1 make them.

2 Okay, Request No. 16, All documents concerning its
3 inclusion or exclusion of specific drugs as essential health
4 benefits pursuant to the Affordable Care Act, including the
5 criteria for inclusion and exclusion.

6 Now, this -- sorry, go ahead, Mr. LoBiondo. Do you
7 have something to say immediately about that?

8 **MR. LOBIONDO:** No.

9 **THE COURT:** Okay. I understand that the Tennessee
10 Court found that this was most likely to reside with SaveOn.

11 Ms. Ledden, do you have anything to say in -- other
12 than that finding?

13 **MS. LEDDEN:** No, we would concur with the judge's
14 finding, of course, regarding Requests 16, 17 and 18.

15 **THE COURT:** Yeah, they were all related; correct?

16 **MS. LEDDEN:** Yes.

17 **THE COURT:** The Affordable Care Act information.
18 Why, I guess, Mr. LoBiondo, why do you think -- I know Accredo
19 and ESI are not the same thing, and I also know that I'm not
20 bound by the District Court of Tennessee, but why do you think
21 Express Scripts would have distinct unique information about
22 these things?

23 **MR. LOBIONDO:** Sure. So we don't have perfect
24 information, obviously, about --

25 **THE COURT:** Sure.

1 **MR. LoBIONDO:** -- what ESI has and what ESI doesn't
2 have. These requests really go to the core of how the program
3 works, so the way they are able to inflate the copay and take
4 extra money is by de-designating the drugs, even if they're
5 cancer drugs, as essential health benefits.

6 **THE COURT:** Right.

7 **MR. LoBIONDO:** So they believe this is a loophole in
8 the ACA that allows them to jack up the copay. And so, you
9 know, we do not have good information exactly about where the
10 metes and bounds of what ESI does, when it stops and when
11 SaveOn begins. If we have an attorney representation as of
12 today that ESI isn't really directly involved in these things
13 even though they are out in the market telling and educating
14 their clients about it, again, I think this falls into the
15 category of, if there are no documents, there are no
16 documents. That's the end of that.

17 **THE COURT:** Okay.

18 **MR. LoBIONDO:** But this is, you know, these requests
19 go to core aspects of the program, and so --

20 **THE COURT:** If the documents exist, you believe they
21 would be discoverable?

22 **MR. LoBIONDO:** They're certainly discoverable and
23 relevant, Your Honor.

24 **THE COURT:** Okay. Let me ask, Ms. Ledden, are you
25 representing today that Express Scripts is not involved with

1 this decision whether to include or exclude something as an
2 essential health benefit?

3 **MS. LEDDEN:** That is correct, Your Honor. We are
4 not involved.

5 **THE COURT:** So Express Scripts does not have
6 anything to do with that decisionmaking process?

7 **MS. LEDDEN:** We do not.

8 **THE COURT:** Okay. All right. Well, it sounds to
9 me, if that, assuming that is the case and Plaintiff doesn't
10 have any reason to think it's not, then this information would
11 not be discoverable. So if I were to compel it, the response
12 would be that there are no such documents; is that correct?

13 **MS. HELLMANN:** Well, that's the issue, Your Honor.
14 Are we involved in de-designating the drugs? No. So do I
15 think there would be any documents? No. But as I've
16 represented today and counsel has referred to, there's a due
17 diligence. So we can talk to our client, but what we don't
18 want to do is like, okay, let's start doing custodial e-mail
19 searches to see if maybe something if -- I mean, I can tell
20 you what our role is and based on that role why we would have
21 communications on this. I'm representing the best I can
22 without having searched for all --

23 **THE COURT:** Searched for all of it; I understand.
24 Okay. And so, Mr. LoBiondo, that decision about
25 reclassifying, that's made at SaveOn, to the best of your

1 knowledge? Do you know how that decision is made?

2 **MR. LOBIONDO:** I believe that the decision is made
3 that there is a dialogue between SaveOn and the ESI clients,
4 and I believe that ESI, the account reps, are involved in
5 those discussions. I don't think that anybody at ESI is
6 flipping a switch and changing a cancer drug from essential to
7 nonessential. But the request is not that narrow; right?
8 It's documents concerning the program's inclusion or exclusion
9 of drugs, and ESI is a part of this program. It gets some of
10 the money from the program; it introduces the clients. It's
11 one of three participants, basically, in this program.

12 And so they are going to have, in my view, based on
13 my understanding of how the conversations flow, which is that
14 even after SaveOn implements the program as to a plan, ESI
15 doesn't disappear; right? ESI, as they've said this morning,
16 they have account reps. They have hundreds of account reps.
17 So my expectation would be that those account reps are part of
18 those communications. If there are communications that SaveOn
19 is also on, we should have them from SaveOn. So, again, we're
20 not asking for duplication.

21 **THE COURT:** Right. I think until you have some
22 evidence that there would be something there at ESI about this
23 reclassification process, so for example, if you do get
24 communications from SaveOn that go to ESI and you're wondering
25 sort of where ESI's responses came from because that makes a

1 difference to your case against SaveOn, then you can make a
2 more tailored request. But I think for this moment I am in
3 agreement with the Court in Tennessee that the information
4 that goes to these three things, to the extent it reflects on
5 SaveOn's liability, which is the only defendant, would be in
6 the possession of SaveOn.

7 And so 16, 17 and 18 will be denied in their current
8 forms. Again, I make no assumptions that I won't be hearing
9 again from either party as the discovery continues.

10 We are on 20 or did I skip 19?

11 **MS. LEDDEN:** We're on 19, Your Honor.

12 **THE COURT:** We're on 19. All documents concerning
13 the reasons and basis for Express Scripts' representation that
14 it does not endorse the services or provide any guidance or
15 endorsement on the legal structure.

16 Okay. What is the objection? It seems pretty
17 specific. What is the objection from, Ms. Ledden, from
18 Express Scripts?

19 **MS. LEDDEN:** There are kind of three here or there
20 are three specifically, Your Honor. One, this is traditional
21 contract language, you know, pointing to a contract that
22 doesn't have something similar in, you know, a business
23 relationship, one.

24 **THE COURT:** Okay.

25 **MS. LEDDEN:** Two, any communications behind the

1 decision of Express Scripts to include this language, likely
2 attorney-client privileged, and also, as we've discussed
3 previously on multiple occasions, our internal discussions
4 regarding our impressions aren't relevant to the underlying
5 litigation.

6 **THE COURT:** Okay. Yes, Mr. LoBiondo?

7 **MR. LOBIONDO:** Very briefly, Your Honor. I don't
8 think -- I don't think this is boilerplate. I think it's
9 pretty specific. They are out pitching the program. They're
10 making money from the program, but they're saying to their
11 clients, Don't come after us if it turns out this program is
12 illegal. So I don't know there's any evidence that this is
13 just something they slap on the bottom of every contract.
14 It's not just in the contract; right? It's in the marketing
15 materials.

16 The other point I would make, is, again, obviously
17 if there's privileged materials, under discovery rules they
18 should have to log those, but we don't want their lawyers'
19 documents. However, if they are talking to or about
20 communications with SaveOn or Accredo, right, those
21 communications might not be privileged because they would have
22 parties who are outside the privilege on them.

23 So we're not seeking duplicative information; we're
24 not seeking privileged information. But this is, you know,
25 this is a pretty red flag as far as we're concerned about the

1 legality of the program and about whether or not it's
2 probative to whether the program is violating the law, and so
3 we think it's pretty squarely relevant.

4 **THE COURT:** Yeah, I'm going to grant this. Of
5 course, if there's privilege justifications for not producing
6 something, then the parties can deal with that the way
7 privilege documents are dealt with. I think it's likely to
8 produce responsive and relevant documents regarding the
9 functioning of the scheme, and to the extent those things are
10 not admissible because they don't ultimately reflect on the
11 actual defendant in the case's liability, that's an issue that
12 I'm going to let the parties dispute in New Jersey and let
13 that judge worry about it.

14 Okay. But as far as discoverability, I think it's a
15 tailored enough response and it's relevant enough to the
16 issues in the case that it should be produced.

17 The documents concerning the inflated copay or
18 increase to SaveOnSP's patients' copay or out-of-pocket
19 obligations, the Tennessee judge thought that this was most
20 likely to be in SaveOn's possession.

21 Why should I come to a different conclusion,
22 Mr. LoBiondo?

23 **MR. LOBIONDO:** So, Your Honor, I think these are
24 very similar to the requests we spoke about a moment ago.
25 These are quotes from the ESI presentation. So, you know, we

1 think they're talking about it; they probably have internal
2 communications about it. But I understand, you know, Your
3 Honor made a ruling that you are not going to compel some of
4 the other aspects of the presentation, so I don't think that
5 these are -- I'm not going to say that these are different in
6 kind from the other ones. These are other quotes from them
7 about how the scheme works.

8 **THE COURT:** Okay. The inflated copay, can you tell
9 me the context of that quote.

10 **MR. LoBIONDO:** Sure. So in the presentation from
11 Ms. Harmon -- and again, that's the only presentation we've
12 seen, but she is explaining to the clients that the way they
13 make more money is by inflating the copay. So she's
14 explaining the whole operation of the program and why they do
15 it the way they do and how they pick drugs because they're
16 going after the drugs that have the most money behind them,
17 basically, so that they can take the most amount of money. So
18 inflated copay, that is ESI describing how the program
19 operates.

20 And savings in 21, you know, from our perspective
21 that's a little bit Orwellian because the savings that they're
22 talking about is the money that they've taken from us. But it
23 is on a basic level money that their plans are not having to
24 pay for our drugs because they are getting the money from us
25 through what we think is subterfuge. So those are quotes from

1 them about how the program works. I don't know if that
2 answers your question.

3 **THE COURT:** No, it does. And it's someone at
4 Express Scripts who said it, so it's a little bit more, I
5 assume, to that extent a little bit more salient to your
6 request here.

7 **MR. LoBIONDO:** Yes.

8 **THE COURT:** Your request here has some more legs
9 than the one to Accredo; right?

10 **MR. LoBIONDO:** Yes, absolutely.

11 **THE COURT:** I understand that. Let me hear from
12 Ms. Ledden why I shouldn't grant it because insofar as it is
13 an Express Scripts statement or statement by someone at
14 Express Scripts.

15 **MS. LEDDEN:** I mean, our position would be similar
16 here as it was to the prior three at issue. Again, our
17 internal thoughts are not relevant to the underlying case
18 here.

19 **THE COURT:** You're already producing Ms. Hellmann's
20 documents; correct?

21 **MS. LEDDEN:** Ms. Harmon's, yes.

22 **THE COURT:** Sorry, Ms. Harmon's. I apologize.

23 **MS. LEDDEN:** That's okay. Lots of Hs.

24 **THE COURT:** It would be a lot easier if they were
25 the same person and we had Ms. Harmon here. You're going to

1 produce Ms. Harmon's documents related to that presentation,
2 so I think that insofar as you're already going to be
3 receiving documents related to the construction of that
4 presentation, I'm going to deny that one.

5 Moving to documents concerning the amount of
6 savings, that's the same basis and the same denial, and I
7 think that's the same for 22 as well. These all kind of hang
8 or fall together; correct?

9 **MR. LoBIONDO:** So 22 is a little bit different.
10 This is -- the joinder agreement referenced there is the
11 agreement I mentioned a minute ago about how once a plan has
12 agreed to sign up for the SaveOn program they sign this
13 joinder agreement.

14 **THE COURT:** Okay.

15 **MR. LoBIONDO:** And so this is, this is sort of more
16 in the contract's bucket.

17 **THE COURT:** Okay. But these are between health
18 plans and SaveOn; right?

19 **MR. LoBIONDO:** Yes.

20 **THE COURT:** But they allow Express Scripts to bill
21 for the fee in the administrative invoice; correct?

22 **MR. LoBIONDO:** Yes. So it's really kind of a
23 tripartite; ESI, SaveOn. The joining that's happening is that
24 this health plan is joining the SaveOn --

25 **THE COURT:** SaveOn. But ESI, you're saying, is a

1 party to each of these agreements or it's implicated by the
2 agreements?

3 **MR. LoBIONDO:** My understanding of how it works is
4 that the plans are joining the ESI, ESI/SaveOn agreement, so
5 they are a party. ESI is a party. Certainly implicated but a
6 party.

7 **THE COURT:** Okay. And so to the extent that I
8 allowed discovery related to the other agreements, you think
9 it's of a piece with that?

10 **MR. LoBIONDO:** Yes.

11 **THE COURT:** Okay. Ms. Ledden, why is it not of a
12 piece with that?

13 **MS. HELLMANN:** Your Honor, it's Ms. Hellmann again.
14 Sorry.

15 **THE COURT:** Sorry, I didn't mean to make
16 assumptions.

17 **MS. HELLMANN:** No, no, we represented that. So the
18 agreement that he's talking about where the health plan then
19 kind of becomes a scion, that agreement, right, doesn't -- we
20 still have that master agreement which we're already giving.

21 **THE COURT:** Right.

22 **MS. HELLMANN:** So this request as it reads, again
23 with the all documents, you know, any communication, any,
24 between Express Scripts and all of its clients --

25 **THE COURT:** Yeah, I was going to say, is that all

1 health plans?

2 **MS. HELLMANN:** Yes.

3 **THE COURT:** That's a number of plans; correct?

4 **MS. HELLMANN:** It is. It is hundreds, if not
5 thousands, right, to say, okay, now you're part of the SaveOn,
6 so now you're part of that agreement. I mean, those back and
7 forths, that's encompassed in this. I mean, it is -- and I
8 know we can make the burden argument, but kind of going back
9 to one of the very early requests, all the communications
10 with, you know, entities; that's every one of our health plan
11 clients on the SaveOn program which is a product we offer
12 everybody.

13 You know, so it's, it is -- I mean, again, to search
14 for it, but just the vast amount that we're talking about,
15 this is not a separate three-party agreement; right? It's if
16 you're part of this program, then you realize some of these
17 savings.

18 **THE COURT:** Right. Let me ask --

19 **MS. HELLMANN:** That's how it works.

20 **THE COURT:** So it's the same agreement that all of
21 these clients are signing though; correct?

22 **MS. HELLMANN:** Correct. It's the program that's
23 offered to the client.

24 **THE COURT:** It's the program that's offered to the
25 clients, but then they have to enter into this 25 percent

1 joinder agreement as part of it?

2 **MS. HELLMANN:** I actually don't know that they
3 actually enter into a separate agreement; more of like, yes,
4 Express Scripts, this service, this product that you offer
5 like we offer any product to clients, we will take that and
6 then we accept it. I honestly don't know because this is the
7 first time I kind of heard that this, like, they actually sign
8 on to that agreement, like a signatory to that master
9 agreement. That in, all honesty, I am just not sure about.

10 **THE COURT:** Okay. Mr. LoBiondo, what can you tell
11 me about, what is the actual thing here that you're looking
12 for? Are you looking for the negotiation of the terms of like
13 a template that was then used thousands of times and you just
14 want what's going to the template, or are you asking for
15 something you don't even know exactly what you're asking for?
16 What's the situation here?

17 **MR. LOBIONDO:** Well, yeah, so there probably is a
18 template, but the 25 percent refers to the fee, the cut that
19 SaveOn and ESI take of our money before passing the rest of it
20 on to the plans.

21 **THE COURT:** Right.

22 **MR. LOBIONDO:** So we don't know if, you know, in
23 most cases our understanding is that it's 25 percent, but we
24 don't know whether there's negotiations, and I believe for
25 some large clients they actually do have negotiations of

1 slightly different rates. It's like a volume discount; right?
2 So a particularly big plan might say to ESI, you know, we're
3 interested in this, but we're not going to let you keep
4 25 percent of it. We want you to keep 20 percent of it or
5 15 percent of it. So those conversations are happening.

6 And just to be clear, it's not all of ESI's clients
7 that this implicates. It's the clients that they have signed
8 up for, this plan that we allege is injuring us. So it's, you
9 know, they cover a hundred million lines, is my understanding.
10 It's certainly -- that's not what we're talking about, the
11 universe. It is apparently hundreds or thousands of plans,
12 which is, you know, goes to the gravamen of the harm, but it's
13 not every ESI plan because not every ESI plan or even a
14 majority or even, you know, anything like a substantial
15 minority of the plans, as far as I know, have signed up for
16 SaveOn. So it's a subset. And that is a burden argument,
17 which is, again, something we could have talked about in
18 January, February, March.

19 **THE COURT:** Okay. And so what you want to know is
20 about the negotiation of that cut, the cut that ESI and -- I'm
21 assuming here his version of the facts; I'm not finding any
22 facts, just so you know. But the -- you're interested in
23 knowing about how that percentage is negotiated?

24 **MR. LOBIONDO:** Yes.

25 **THE COURT:** Is that it?

1 **MR. LoBIONDO:** Yes.

2 **THE COURT:** And have you gotten information from
3 SaveOn about that? Have they had to produce documents related
4 to that?

5 **MR. LoBIONDO:** We have, to the extent SaveOn is a
6 part of those discussions, we have documents from SaveOn. To
7 the extent there is negotiations between ESI and its clients
8 that SaveOn is not a part of or is not yet a part of or
9 there's side negotiations, we don't have those. Anything that
10 SaveOn doesn't have visibility into, we don't have.

11 **THE COURT:** And is it your impression that that's a
12 significant universe of things?

13 **MR. LoBIONDO:** My impression is that sometimes ESI
14 account reps forward things to SaveOn and say, What about
15 this, what about that, and sometimes they don't; right?
16 Because at the end of the day these are ESI's clients, so we
17 have kind of half of the picture. We see things that in the
18 e-mails that ESI people choose to kind of escalate to SaveOn,
19 but SaveOn is not part of the ESI, CIGNA family of companies;
20 right?

21 And so there may well be proprietary conversations
22 that SaveOn is not a part of or there are only, you know,
23 SaveOn is only part of half of the conversation but not the
24 whole thing because they are on some level at arm's length
25 with ESI, even though there's unity of interest in some

1 respects.

2 So the short answer is we don't really know what ESI
3 is talking about back and forth with their clients. To the
4 extent ESI is then bringing SaveOn into the discussion, we
5 have those from SaveOn, and we don't need them from ESI. But
6 sitting here now, I don't know that that's happening -- I
7 certainly don't think it's happening all the time. I don't
8 even know that it's happening most of the time. And the party
9 that would be in the best position to answer those
10 questions --

11 **THE COURT:** Is ESI.

12 **MR. LOBIONDO:** -- would have been ESI doing an
13 inquiry sort of before this morning.

14 **THE COURT:** Okay. Let me ask, is this information,
15 how much the percentage that these, that SaveOn is keeping --
16 because SaveOn is the defendant again, let's not forget -- the
17 percentage that SaveOn is keeping as to each of these
18 individual clients or plans that are signing up, does that go
19 to just liability, or does that go to damages as well?

20 **MR. LOBIONDO:** It certainly goes to liability.
21 Sitting here right this moment, the damage is the same.

22 **THE COURT:** No matter what percentage of it that
23 SaveOn keeps; right? I'm trying to wrap my head around how
24 this works.

25 **MR. LOBIONDO:** Right, so if they -- and I haven't

1 given this more than the thought that I'm just saying it in
2 realtime, but if they take \$1000 of our money from a fill or
3 more likely \$10,000, whether or not, how they split that up is
4 a liability question. I'm not sure that it is a damages
5 question. I would have to go back to the damages experts and
6 ask that. Because at the end of the day it's \$1000 out of our
7 pockets that we shouldn't have paid. So --

8 **THE COURT:** So this -- okay.

9 **MS. HELLMANN:** Your Honor, may I respond briefly?

10 **THE COURT:** Yes, you may.

11 **MS. HELLMANN:** The last question you asked is one of
12 the first questions -- one of the first points I was going to
13 bring up, is if this is about, SaveOn, should you have done
14 this program and how much Johnson & Johnson has been damaged,
15 let's just say there are different cuts between SaveOn, health
16 plan and Express Scripts. I definitely don't think it goes to
17 damages. I'm not even sure liability, whether SaveOn -- I
18 mean, they're saying SaveOn shouldn't be doing this at all, so
19 whether it's a 10 percent cut or a 15 percent cut. So I don't
20 think it's relevant.

21 But second of all, what I've heard is we think maybe
22 there might be different cuts, but we're not sure, and maybe
23 Express Scripts doesn't forward things on. I mean, we are not
24 a party to this. This -- I mean, this is a fishing
25 expedition, you know, and we think this might happen, but we

1 don't know, so you, Express Scripts, go start pulling e-mails
2 from hundreds and thousands of account team people to see if
3 maybe there's something there.

4 I mean, if there was an e-mail between that they've
5 received of like, huh, that's odd because we would expect a
6 response to this, Express Scripts, then we have a client to go
7 look for, we have an account team to go look for; we actually
8 have a target that we can look for. But this like, well, we
9 think that probably you didn't always forward it on, is based
10 on nothing but speculation.

11 **THE COURT:** Well, it's not speculation that whenever
12 someone signed up for SaveOn, Express Scripts and that plan
13 had, if not a full-on negotiation, but they came to terms in
14 some way; right?

15 **MS. HELLMANN:** I mean, yes, but what I haven't heard
16 is is there any -- that the term is different for big plans or
17 little plans or there's a negotiation. Again, we offer
18 products, you know, and that tends to be what we do. Now, I
19 mean, certainly big plans have more leverage, the Blues versus
20 these small employer group, right, has more leverage.

21 **THE COURT:** Right.

22 **MS. HELLMANN:** So everything about Express Scripts'
23 relationship with them is different; right? We give bigger
24 discounts. We give higher rebates. I mean, you can talk
25 through all the nuances of that. But I haven't heard that

1 like because it's a big plan that's going to be different, or
2 even if it is different, why that's relevant to that piece of
3 litigation.

4 **THE COURT:** Okay. Do you -- okay. To the extent
5 there's communications between Express Scripts and SaveOn on
6 this, then SaveOn would have had to produce it; correct?

7 **MR. LoBIONDO:** They should have, yes.

8 **THE COURT:** So it's not a question of collusion
9 between those two parties; at least this discovery request is
10 not aimed at that. What you are trying to find out is what
11 the terms of these various agreements were with the ultimate
12 client of the SaveOn program; correct?

13 **MR. LoBIONDO:** ESI in this capacity is kind of the
14 matchmaker; right? ESI is sitting in the middle.

15 **THE COURT:** Okay. And why does it matter what those
16 terms were?

17 **MR. LoBIONDO:** Well --

18 **THE COURT:** If you know that there was a term, there
19 was some kind of term where the pie was sliced up, why does it
20 matter what those terms were?

21 **MR. LoBIONDO:** So this potentially goes to SaveOn's
22 defenses in the litigation, right, because SaveOn is -- one of
23 their defenses is, oh, this program is actually great for
24 patients. It's actually great for plans. We're saving plans
25 all of this money, and so, you know, the difference between 25

1 and 26 percent, maybe not all that relevant, but if there is
2 real variability in the terms of the different plans we're
3 getting, at a certain point it gives the lie to any defense by
4 SaveOnSP that like we're doing this to bail out the plans if
5 actually most of the money or a big chunk of the money is not
6 going to the plans at all; it's going to SaveOn and ESI.

7 **THE COURT:** So you don't -- do you have any other
8 source of information about how this pie is sliced up?

9 **MR. LOBIONDO:** Other than the contracts and the
10 e-mails that SaveOn has produced, we don't, and I would also
11 just say, you know, we have to this point not gone out and
12 subpoenaed ESI's health plan clients. I assume that they
13 don't want us to do that, but ESI is, again, the person, the
14 entity that's sitting in the middle of all this, so we
15 wouldn't be burdening the small employer plans that are caught
16 up in all of this.

17 And I don't want to belabor this point because I
18 think Your Honor understands it, but the idea, you know, it's
19 true they are not a party to the New Jersey litigation, but
20 neither are they somebody that we just pulled in off the
21 street; right? They are, they are profiting from the conduct.
22 They are getting our money, and I think, you know, this is not
23 just attorney argument; right? We've put in the exhibits that
24 show to Your Honor that they work with SaveOn to inflate this
25 copay. They take that money, and then the 25 percent they

1 split between ESI and SaveOn itself. So, you know, I just --

2 **THE COURT:** That's generally the sense of how it
3 works.

4 **MR. LoBIONDO:** That's the general, yes.

5 **THE COURT:** But you're saying you don't know how it
6 works as to each specific client; right? Because it may be
7 that they negotiated a different percentage of that money?

8 **MR. LoBIONDO:** We -- the final contracts we should
9 have from SaveOn.

10 **THE COURT:** With each of the plans?

11 **MR. LoBIONDO:** With each of the plans or they should
12 be producing them if they haven't yet.

13 **THE COURT:** Okay.

14 **MR. LoBIONDO:** So this is a request for
15 communications about the plans, drafts of the plans, because
16 it's very possible that those communications and those drafts
17 would be going back and forth between ESI and its client
18 without SaveOn. We don't know. But --

19 **THE COURT:** Okay. I'm going to -- I'm going to deny
20 it then because I was with you when I thought you needed the
21 percentages to determine -- to counter this argument that it
22 is somehow benefiting the plan, but if you have the
23 percentages from somewhere else, specifically those contracts
24 or information from SaveOn, then I'm not going to require
25 this, this defendant in this case to produce internal

1 communications about it.

2 If, of course, you find out you can't get that
3 information that I agree sounds like you would benefit from
4 and goes to specifically exactly how these things are working,
5 if you don't have transparency into how the plan is working
6 and this is the only way to get it, we can have a
7 conversation. But it seems to me that you have transparency
8 into the numbers or you should from what SaveOn is producing,
9 and so in that event I'm going to agree with the burden
10 argument and the relevance argument until I find out that you
11 can't get what you need. Is that clear enough? Clear as mud?
12 Denying 22; right?

13 **MR. LOBIONDO:** Yes, Your Honor. Thank you.

14 **THE COURT:** 23, Documents concerning communications
15 Express Scripts has received, complaints, concerns or
16 inquiries. Okay, I understand there's ongoing briefing in
17 Tennessee about this, something filed yesterday about the
18 practicalities of finding this information at Accredo,
19 Accredo; I don't know how to say it. But I assume you're not
20 just using Accredo's databases, right, so I can't just import
21 those arguments here. Why would this not be something that is
22 relevant to how this plan is functioning and exclusively in
23 the custody of Express Scripts?

24 **MS. LEDDEN:** We wouldn't argue that, Your Honor. We
25 would just argue that we're unable to produce it, that there's

1 an extreme burden here.

2 **THE COURT:** Okay.

3 **MS. LEDDEN:** As you probably saw in the Accredo
4 briefing, they're lucky enough to be able to use some search
5 terms. We don't have the benefit of that. There isn't a
6 centralized database for patient complaints, to the extent
7 they exist. Again, you know, the focus here is on client
8 interaction, so client, client complaints, client inquiries,
9 etc. As we previously discussed, those would come in to the
10 account managers, would be spread across the board, etc.

11 Ultimately I think what's relevant to Your Honor is
12 that any complaints that would be relevant to this action
13 would be sent up to SaveOn and potentially Accredo. They have
14 their separate burden argument, but those would be the two
15 entities that would receive any information if it had anything
16 to do with the plan design.

17 As you can imagine and as indicated in Accredo,
18 again, separate entity, pharmacy, so many of the kind of
19 inquiries we get, to the extent we get any, again, queries
20 from patients, are really more escalations. Why didn't I get
21 my medicine? And then we send it on to Accredo. This isn't
22 working for me. I, for some reason, can't sign up. We send
23 them on to SaveOn, etc., that kind of thing.

24 Again, this is like looking for a needle in a
25 haystack. We just don't get very -- again, we're a PBM. Our

1 relationships are with clients.

2 **THE COURT:** Okay. Mr. LoBiondo?

3 **MR. LOBIONDO:** So, Your Honor, to me this is a
4 little bit of ESI trying to have it both ways; right? They
5 sell the program to their clients, and then what I'm hearing
6 is that if the clients -- you know, these clients are plan
7 sponsors; right? So they're employers. If a human resources
8 professional at the employer then connects with the account
9 rep at ESI and says, We're having all of these difficulties,
10 or We're having this problem, or It's not working like you
11 said it would work, their position is, We shouldn't have to
12 produce that because it would be like finding a needle in a
13 haystack.

14 They have the relationship with the plans. That is
15 sort of -- that is one of the value-adds ESI is bringing to
16 this scheme; right? They are introducing the plans to the
17 SaveOn program, and they still have a customer relationship
18 with the plans. And so patients' complaints often are going
19 through the plans, and so they should be going to ESI that
20 way.

21 And, you know, if ESI is getting complaints,
22 concerns or inquiries from governmental agencies about SaveOn,
23 I find it a little bit hard to believe that they just wouldn't
24 even know where to look for those. I mean, regulatory
25 inquiries about this program, congressional inquiries, state

1 AGs, there's been a lot of activity in that area.

2 So one of the requests we're asking for here is
3 complaints, concerns and inquiries from not just patients,
4 right, but also patient advocacy groups, their own
5 customers -- plan sponsors -- and governmental agencies.

6 So, again, what we're hearing is a burden argument
7 that is different than the arguments we briefed up, and that's
8 fine, but you know, if patients are complaining to ESI that
9 they're not getting their medicine or that the plan -- that
10 SaveOn is not working as they were promised by ESI, that's
11 relevant, and that's obviously relevant to patient harm.

12 **THE COURT:** Okay. I think it is relevant and -- to
13 the issues in the underlying lawsuit. That's not to say there
14 isn't some kind of burden argument that can be made, but I
15 think it would need to be first discussed between the parties
16 about whether this can be reasonably narrowed to a point where
17 you can produce enough information to satisfy Plaintiffs
18 without unduly burdening your client.

19 But after that if you cannot agree on the scope of
20 the universe of information that is going to be produced, I
21 will take it up then. I'm not going to right now
22 hypothetically try to carve up this, you know, request, but it
23 seems to me that the information expressed to Express Scripts
24 about the functioning of the SaveOn program described as
25 Request No. 23 generally does seem to be discoverable.

1 So I'm going to grant the motion to compel and
2 hopefully that there can be a discussion between the parties
3 now about exactly what form that production will take, and
4 hopefully Plaintiff will be reasonable in what they expect
5 Defendant to do in response to that request such that we never
6 have to discuss it again. But if that doesn't happen, then
7 you can file something by next Friday.

8 Okay. Documents sufficient to identify Express
9 Scripts' patients who are participating in SaveOn, when they
10 signed on to the program, if when they discontinued their
11 participation in the program, and information on how these
12 patients can be identified in the transaction claims data
13 produced hopefully aspirationally in response to Request
14 Nos. 26, 27.

15 Why would that not be relevant information? I'm
16 going to start with Express Scripts.

17 **MS. LEDDEN:** To be honest, Your Honor, we're not
18 entirely sure what they want.

19 **THE COURT:** Okay. So have you --

20 **MS. LEDDEN:** So we're in that situation, and then,
21 additionally, any information regarding SaveOn patients
22 specifically they've already received and they're in the
23 middle of negotiating with Accredo, the pharmacy, a
24 significant portion of any data that we would have would come
25 directly from Accredo.

1 And so at this point I think it's best we keep this
2 in abeyance, honestly, until they sort things out with Accredo
3 and then can properly identify things that may be uniquely in
4 our possession that we could provide them.

5 **THE COURT:** Is Accredo, do they manage all of your
6 clients who are involved in SaveOn? Is that, they exclusively
7 process?

8 **MS. HELLMANN:** Yes, it was raised today on the call
9 because it's always been our understanding they mentioned,
10 they said, no, there's other pharmacies that do the SaveOn
11 program. That was -- I'm not sure where that came from. That
12 was news to us. We since have been actually trying to confirm
13 with the client that in fact our understanding is correct that
14 it's only Accredo that is the pharmacy for this program.

15 **THE COURT:** Okay.

16 **MS. HELLMANN:** And so I don't know if they have more
17 information as to what made them think it's Accredo plus other
18 pharmacies because when it was raised this morning, it was --
19 it's not been raised before.

20 **THE COURT:** Okay.

21 **MS. HELLMANN:** Again, so that's why this
22 information --

23 **THE COURT:** Could all be coming from Accredo?

24 **MS. HELLMANN:** Yes.

25 **THE COURT:** If Accredo is the only pharmacy that's

1 processing.

2 Okay, Mr. LoBiondo?

3 **MR. LOBIONDO:** Your Honor, it's always very
4 interesting to hear them say we don't know what they're asking
5 for here when this is a subpoena they've had since January.

6 But, you know, what I'll say is I do think in
7 fairness to them, it says, Transactional claims data produced
8 in response to these other requests. I think that's
9 misnumbered because the data requests are later in our
10 requests. I think it's 28, 29 and 30.

11 And what I'll say is this, and this is going to
12 collapse a little bit into the discussion of the data. Again,
13 we don't have perfect visibility into how the data is split up
14 between ESI and Accredo. We do think that -- I agree with
15 counsel that most of the data, most, if not all, of the data
16 relating to transactions with patients that were affected by
17 the SaveOnSP program should have gone through Accredo, which
18 is not to say that ESI does not have any relevant data.

19 A, we don't know what the Tennessee judge is going
20 to do, whether he's going to require Accredo to produce data.
21 We don't have good information about, you know, which data
22 lives at which entity.

23 But this request, you know, how patients can be
24 identified in the transaction and claims data, basically what
25 we're asking for here -- and this is another documents

1 sufficient; it's not all documents -- we want to make sure
2 that whichever one of their entities produces the data, we can
3 figure out what it means, right, and figure out who the
4 patients are and match it up with other data that we have on
5 our CarePath program because it doesn't do us any good to have
6 data that does not line up with what SaveOn produced. We need
7 to be able to make use of everything.

8 So I agree with counsel that we don't need a list of
9 patients who are participating in the program because we have
10 gotten that from SaveOnSP.

11 **THE COURT:** Okay.

12 **MR. LoBIONDO:** But to the extent the data, if they
13 are compelled to produce data --

14 **THE COURT:** Right.

15 **MR. LoBIONDO:** -- we need to have information from
16 them on how to link up that data with -- how to link up the
17 patients across the data sets.

18 **THE COURT:** Okay.

19 **MR. LoBIONDO:** And so that's what this request --
20 you know, there's other things here, and they will either tell
21 us or they should have told us already whether this stuff is
22 kept in the ordinary course of their business, but we think
23 they have a lot of data.

24 **THE COURT:** Right.

25 **MR. LoBIONDO:** So this is a request that's just

1 trying to make sure that data is usable.

2 **THE COURT:** Okay. Okay, I'm trying to understand
3 now because it's related to the other requests, and you said
4 you have some of it already. So you have Express Scripts'
5 patients who are participating in the SaveOnSP program, you
6 have a list of those people; yes?

7 **MR. LoBIONDO:** Correct.

8 **THE COURT:** Do you have the information about when
9 they signed up, discontinuation information about how they can
10 be -- so the last part is about how to identify them and any
11 other data; correct?

12 **MR. LoBIONDO:** That's right. And with the data that
13 SaveOn has produced, we have not been able to identify
14 specific patients in that data. So it's an incomplete data
15 set, and it's also -- it doesn't have the identifying
16 information we need.

17 **THE COURT:** SaveOn's data?

18 **MR. LoBIONDO:** The data that SaveOn has produced to
19 us, correct.

20 **THE COURT:** Have you asked SaveOn to link up the
21 data with the list?

22 **MR. LoBIONDO:** Yes. We asked them for more
23 categories of data, and they said to us -- and this, now I'm
24 reading from a letter that they sent us -- SaveOn will produce
25 the requested data within its possession, custody and control.

1 The vast majority of this data comes to SaveOn from ESI.

2 **THE COURT:** Okay. And are you -- how sure are you
3 that they're going to produce anything else? Have they made
4 it clear that they have other things they're going to give
5 you, or are they now telling you to go ask Express Scripts?

6 **MR. LOBIONDO:** Our understanding is that they have
7 given us or are giving us what they have visibility into, and
8 it is not the full universe of what we need. And, in fact, on
9 a meet-and-confer the other day, they were telling us that
10 they need more data because they can't -- you know, they were
11 saying for their damages defense they need information about
12 transactions that happened after the CarePath assistance has
13 been extended.

14 So this is all transaction-level claims data that
15 either ESI or Accredo has. Some of it Accredo definitely does
16 not have, the transactions that don't go through Accredo, but
17 with respect to the SaveOn program-affected patients, it's
18 either Accredo or ESI, and we don't know. I assume they know.
19 And if we get it all from Accredo, that would be great, but we
20 don't know if we're going to. And even if we got everything
21 we asked for from Accredo, we would still need some stuff from
22 ESI.

23 **THE COURT:** Okay.

24 **MR. LOBIONDO:** I realize that is -- I have gone
25 beyond the bounds just of 24, but I think it is --

1 **THE COURT:** This is 24 and 28 through 30
2 essentially; correct?

3 **MR. LOBIONDO:** It is all related, yes.

4 **THE COURT:** Okay. Yes, Ms. Hellmann?

5 **MS. HELLMANN:** I mean, a couple of things. One --
6 and maybe I just misheard him. The letter he read, I think he
7 read -- I have too many plans in my head. SaveOn said all the
8 data we have we get from Express Scripts, so presumably they
9 have that data, whatever data they were referring to.

10 **THE COURT:** Yeah. I think they said most of this
11 comes from Express Scripts. Is that what you're saying?

12 **MR. LOBIONDO:** Yeah, so ESI gives SaveOn some of the
13 data we need but not all of it.

14 **MS. HELLMANN:** And so I guess -- and maybe we can
15 short-circuit this a little bit. Accredo is the pharmacy that
16 adjudicates the scripts, so all this information comes into
17 Accredo. As the PBM, that data then comes to Express Scripts;
18 okay? But whether a patient is enrolled or not enrolled,
19 remember, we are not -- we, Express Scripts, are not enrolling
20 patients. We have clients.

21 So maybe a member doesn't -- is not enrolled anymore
22 because he or she doesn't have that health insurance anymore;
23 right? That is not information that's in Express Scripts'
24 data; right? We -- any prescription that we adjudicate,
25 whether that be for Walgreen's or Accredo, we have that data,

1 but what I'm hearing here is, And even if we don't -- even if
2 we get everything from Accredo, we still need stuff from
3 Express Scripts.

4 And my question is, tell us what that is. What
5 field of data does not reside in Accredo, right, when they're
6 kind of going through all this briefing with the Court, that
7 you need from Express Scripts. We are talking about massive
8 amounts of data. It is not a couple clicks and run a report.
9 It is -- I don't want to speculate -- hours, hours and hours
10 of people's time to pull this data.

11 **THE COURT:** Okay, but Accredo is not producing it,
12 right, yet?

13 **MS. HELLMANN:** Yeah, I think that's what the
14 briefing is --

15 **THE COURT:** Is about, whether or not they're going
16 to produce it?

17 **MS. HELLMANN:** Right, and what extent they're going
18 to produce.

19 **MS. LEDDEN:** The judge there was concerned about the
20 extreme burden on the party and then wanted some more
21 information from J&J regarding the additional relevance of
22 material outside.

23 **THE COURT:** Okay, yes, but it's currently being
24 briefed; right, Mr. LoBiondo?

25 **MR. LOBIONDO:** It is.

1 **THE COURT:** So I think maybe that it's correct that
2 this should be held in abeyance, especially as far as he's
3 moved the ball farther than I have, and many of the issues
4 about burden I would think would overlap to some extent, or
5 they would be mooted, if Accredo doesn't produce it or if
6 Accredo does produce it and you have no need for it from
7 Express Scripts, then we don't have to have this conversation.
8 And that's my favorite solution. So maybe we should hold off
9 on 24 and 28 through 30 until we hear or until the Tennessee
10 Court has a chance to consider the arguments there.

11 Is that -- Mr. LoBiondo, how would that handicap
12 you?

13 **MR. LOBIONDO:** I think in broad strokes that's fine
14 so long as, you know, to state the obvious, we don't agree
15 that it's burdensome to provide data; right? This is what
16 they do. This is what Accredo and ESI does. ESI is a
17 \$100 billion company. So this is not like -- we're not asking
18 them to run searches through e-mails; right? It's data. It's
19 collected and stored in centrally stored places. It's -- you
20 know, there's no privileged information in there. It doesn't
21 have to be reviewed by attorneys.

22 So the burden argument, I think, is specious, but
23 if, if Accredo is directed to produce the data that Accredo
24 has, then we don't need that data from ESI. We don't know
25 whether that's going to happen, and I am a little bit

1 concerned about running out of time.

2 **THE COURT:** Time, yes.

3 **MR. LOBIONDO:** So my preference would be to handle
4 this the way we've handled some of the other requests, which
5 is granting it, and then if it turns out we're getting it from
6 Accredo, we don't need it from ESI. We will not seek to
7 enforce that.

8 But also, I don't want to lose sight of at least
9 request 29 which I think does cover data that Accredo is
10 likely not to have for the reasons that I talked about a
11 little bit at the beginning, which is Accredo only has,
12 obviously -- I guess it's a truism -- they only have data for
13 transactions that have gone through Accredo.

14 But ESI has plenty of plans who -- where patients
15 are taking Janssen drugs, my understanding is, that are not
16 obligated to go through Accredo. So these are patients that
17 are not affected by SaveOn. And this goes to kind of the
18 baseline figuring out what our damages are.

19 **THE COURT:** I see.

20 **MR. LOBIONDO:** And so, you know, Accredo will have a
21 subset of 29, but it will not have all of 29.

22 **THE COURT:** I see, because it will not have the
23 information on the non-SaveOn patients who are taking Janssen
24 therapies?

25 **MR. LOBIONDO:** It will presumably have some

1 non-SaveOn patients but not -- I don't know how many. Because
2 it could be that some of these clients already, even though
3 SaveOn never came into the picture, they were already using
4 Accredo, but other plans are not. Other plans let patients
5 get their drugs from a normal pharmacy.

6 **THE COURT:** Right, okay. And what you're asking for
7 in 29 is information about everyone who has taken these
8 particular Janssen drugs; yes? Whether or not --

9 **MR. LoBIONDO:** It's the transactions, right, so it's
10 telling us these people over here who were on the SaveOn
11 program, they were charged this. We were charged that. And
12 then, on the other hand, patients who never got swept up in
13 the SaveOn scheme --

14 **THE COURT:** Were charged this and they paid that.

15 **MR. LoBIONDO:** -- something different and we were
16 charged something different, yes.

17 **THE COURT:** And that is for the calculation of
18 damages?

19 **MR. LoBIONDO:** Correct.

20 **THE COURT:** Okay.

21 **MS. HELLMANN:** Your Honor?

22 **THE COURT:** Why should I not treat 29 differently,
23 Ms. Hellmann?

24 **MS. HELLMANN:** I actually was reading 29 where it
25 says at least one of the Janssen drugs subject -- am I reading

1 that wrong? I've recopied.

2 **THE COURT:** I had to read it a couple times too, but
3 I think, Mr. LoBiondo, what you're saying there is that these
4 are the Janssen drugs that could have been subject to or are
5 subject to the SaveOnSP program, but you want information
6 about patients who took them, whether or not they were subject
7 to the SaveOnSP program; correct?

8 **MR. LOBIONDO:** Exactly. So Darzalex patients,
9 whether or not in the SaveOn scheme.

10 **THE COURT:** Okay. So the drug subject to the
11 SaveOn, that's the category of drugs.

12 **MR. LOBIONDO:** Exactly.

13 **THE COURT:** But the patients is everyone, whether or
14 not they were in the SaveOnSP?

15 **MR. LOBIONDO:** Correct.

16 **THE COURT:** Okay. Does that help, Ms. Hellmann?

17 **MS. HELLMANN:** It does. I was reading it that were
18 part of that program.

19 And so let me just tell you what that would
20 encompass. So there are -- I'm not sure how many Janssen
21 drugs there are; maybe nine. I saw them listed somewhere.

22 **THE COURT:** They're listed right here. Including
23 but not limited to; at least 20 drugs.

24 **MR. LOBIONDO:** Yeah, and SaveOn sometimes changes
25 the drugs that are in the program.

1 **MS. HELLMANN:** So it's a Johnson & Johnson, also a
2 very large company, their drugs; correct?

3 **THE COURT:** Yes.

4 **MS. HELLMANN:** Express Scripts adjudicates the
5 billion prescriptions, it's all of this coming in, so there is
6 a data warehouse, and it is not simply click some buttons. We
7 would have to, if every pharmacy in the country -- there are
8 70,000 pharmacies in our network. We would have to find those
9 drugs and produce the data. I mean, I would need some time,
10 and we could come back with what that would entail.

11 I mean, it is a massive undertaking, and certainly
12 if the nonparty is being asked to help this plaintiff with
13 their damages, to the extent the Court is even inclined to
14 grant this, there has to be cautionary involved. We are
15 talking about a massive, massive undertaking.

16 I had a problem with it when it was just, I thought
17 it was people in this program. Now we're talking about every
18 one of these drugs that presumably changed to look for the
19 NDC, which is that unique drug identifier for every drug, and
20 any one of those drugs are going to have numerous NDCs because
21 if you change the day supply, it changes the NDC number
22 associated with the drug.

23 **THE COURT:** Okay, Ms. Hellmann, can I stop you for a
24 second? What -- Was there ever any question whether the
25 information that was responsive to Request No. 29 would have

1 been had by SaveOn, SaveOn would have had that?

2 **MR. LOBIONDO:** Yeah, so -- I'm sorry.

3 **THE COURT:** Go ahead.

4 **MS. HELLMANN:** I don't think so. If the -- I'm just
5 thinking out loud. If it wasn't part of the SaveOn program;
6 right? They're simply saying, Express Scripts, give us your
7 data of patients that have received a Johnson & Johnson drug.

8 **THE COURT:** Yes, that's my interpretation too. So
9 what I'm wondering is what was your rationale for not having a
10 conversation with them about this problem before now?

11 **MS. HELLMANN:** Because I didn't realize that they
12 were talking about everything until right now. We've --

13 **THE COURT:** Okay.

14 **MS. HELLMANN:** -- kind of like get the stuff from
15 Accredo; right? I was reading this of like subject to the
16 SaveOn program like they were part of the SaveOn program.
17 This is all data. So I mean, we can certainly talk about it,
18 but it is --

19 **THE COURT:** What you were supposed to talk about.
20 You guys are supposed to talk about this before you come to
21 me.

22 **MS. HELLMANN:** And I would have said the same thing.
23 I was reading this request a little differently.

24 **THE COURT:** Okay, but I mean, it doesn't seem like
25 you've had a lot of practical conversations about producing

1 anything. I'm hearing a lot of burden arguments without a lot
2 of, you know, we asked the plaintiff if they would accept this
3 subset of the information, and they said no. It doesn't sound
4 like those conversations have happened at all; is that
5 correct?

6 **MS. HELLMANN:** Well, you're asking me to speculate
7 on some conversations we were not a part of.

8 **THE COURT:** Okay, fair enough. But I mean, we've
9 had months and months and months to talk about this stuff and
10 to say what you're saying now, and even if you weren't in the
11 conversations, those conversations didn't happen. Did they
12 happen, Mr. LoBiondo?

13 **MR. LOBIONDO:** There were numerous meet-and-confers
14 with ESI counsel, not counsel who's here right now.

15 **THE COURT:** Okay.

16 **MR. LOBIONDO:** And they were never, you know, Oh,
17 we're not clear on what tranche of data you're asking. It
18 was, We're not producing -- from the very first
19 meet-and-confer ESI's subpoena counsel said, We are never
20 going to produce any transactional data unless and until a
21 Court orders us to do so. So that was their position in
22 February.

23 **THE COURT:** Right. So my concern is if I don't
24 order the production of this information, then those
25 conversations still won't happen.

1 **MS. HELLMANN:** Well, they will. On this one, they
2 will.

3 **THE COURT:** Okay.

4 **MS. HELLMANN:** Because -- I mean, it is -- it could
5 be one of the largest data pulls Express Scripts has ever had
6 to do if, in fact, this is that data.

7 **THE COURT:** I hear what you're saying. That sounds
8 hard. I can't evaluate how hard or what subset of that might
9 be doable or proportional to the needs of the case here right
10 now in realtime for the first time. So -- and I don't want to
11 take a lot of time for briefing, and I know you guys don't
12 want to take a lot of time for briefing, but you obviously
13 don't want to produce what's actually being asked for here.

14 So I would just say, I mean, if you don't want me to
15 just blanket order this information, because it does seem to
16 be relevant to their calculations, that doesn't mean you
17 should have to produce it. Maybe someone else is already
18 producing it; maybe the parties can meet and confer and come
19 to some kind of terms about a more reasonable data set.

20 But it does seem relevant, and if you don't want me
21 to order that you produce all of it, then I would suggest that
22 you begin by making a counterproposal to the plaintiffs with
23 specifics about exactly what it would require to obtain this
24 information.

25 **MS. HELLMANN:** I will do so.

1 **THE COURT:** Okay. I'm going to hold the
2 data-related requests in abeyance because it sounds like
3 maybe, having had this conversation, you all can have further
4 conversations that would move the ball forward more quickly
5 and efficiently than me making an order in one direction or
6 another today. Please have those conversations, and then if
7 you need an order from me, come back next Friday.

8 I will tell you that when the parties are as far
9 apart as these parties are in discovery, this is when I start
10 considering just send me your, you know, rival proposals and
11 I'll pick one kinds of solutions, because it's just not
12 possible for me to adjudicate every single detail. I'm the
13 one in the room who knows the least about the issues that
14 you're asking me to resolve.

15 And so it may be the case that you're going to ask
16 me to do eenie, meenie, miney, moe and pick whoever's seems
17 more reasonable. That never works out as well for the parties
18 as if they've actually managed to come to some agreement in
19 the middle. So I would just strongly encourage you to have
20 the rest of this conversation that we're about to have with
21 each other, and then I will encounter the issue again next
22 Friday if it needs to be encountered.

23 I assume -- I'm not under any illusions that you all
24 go away and resolve everything, especially since a lot of what
25 you're arguing depends on whether Accredo is going to be

1 producing something and whether, you know, SaveOn already has
2 produced something. You're going to need more information or
3 more discussion, and that's fine, but let's try to narrow the
4 issues. Let's try to get a little closer, please, before I
5 have to make a black-or-white kind of decision like this,
6 because it sounds like that would be bad for everyone
7 involved.

8 Okay, so that is 24, 28 through 30, is that right,
9 the ones that are data-related?

10 **MR. LoBIONDO:** Yes.

11 **THE COURT:** Then we have 25, 26 and 27, guys. All
12 right. The plan formularies, plan summaries or other
13 documents sufficient to identify patient cost-sharing for
14 plans where the SaveOn program was ever offered, including
15 cost-sharing components such as annual deductible, etc.

16 Can this information be obtained from SaveOn?

17 **MR. LoBIONDO:** No, SaveOn says they don't have it.

18 **THE COURT:** Okay.

19 **MR. LoBIONDO:** This is true for all three,
20 actually --

21 **THE COURT:** All three, yes.

22 **MR. LoBIONDO:** -- SaveOn.

23 **THE COURT:** They seem to be kind of related to each
24 other.

25 **MR. LoBIONDO:** Yes.

1 **THE COURT:** Okay. Why do you need it?

2 **MR. LOBIONDO:** So these plan formulary documents
3 are, you know, these are kind of the default rules of the
4 plans that ESI has and that their clients have. And so this
5 is where we get the information about how, you know, separate
6 and apart from whatever specific thing that SaveOnSP program
7 does, it's basically the default rules before there is the
8 edit of the SaveOn program; right?

9 So how, after the SaveOn program is implemented,
10 patients, CarePath support and any manufacturer copay support
11 is not counted toward those patients' out-of-pocket maximums,
12 not counted toward their deductibles, not counted toward their
13 cost-sharing at all. But in most cases or at least some cases
14 before SaveOn came in the picture, the patients were getting
15 the benefit of those dollars.

16 And so one of the ways that the SaveOn
17 program harms patients is that it actually makes their other
18 healthcare needs more expensive because the money that they
19 were getting from CarePath to afford their cancer drugs is
20 also accumulating toward their other healthcare expenses.

21 And SaveOn has raised a number of defenses, but one
22 of the defenses is, well, you don't actually -- or one of
23 their arguments is you need to have perfect information about
24 exactly what the plan terms were before the implementation of
25 our plan because it's possible that there are some patients

1 who already were subject to what's called in the industry an
2 accumulator where they were not getting the benefit of that
3 copay support in any way.

4 So this is kind of a similar thing to the data,
5 although it's not, it's not a spreadsheet, right, it's
6 documents that ESI helps plans prepare to tell their employees
7 what their benefits are, and we need visibility into what the
8 benefits were before and after the implementation of the
9 program. And SaveOn doesn't have that, right, because SaveOn
10 comes on the scene at a certain point and doesn't, in a
11 comprehensive way, doesn't really know what the plan was
12 offering in the year before SaveOn came on.

13 **THE COURT:** Okay, thank you.

14 **MS. HELLMANN:** Again, we're talking about hundreds
15 of plans; right? So you have the plan design documents, and
16 the requests aren't really worded quite as nice, like we need
17 one before and one after; right? I think that's ultimately
18 what he means.

19 We actually when we talked this morning today and we
20 followed up with an e-mail saying we can give you like
21 exemplar plan documents. My -- and what we proposed is give a
22 couple plans and let's look to see if there even is this
23 difference that I think you're alleging before we go start
24 trying to pull plan summary and plan documents for hundreds
25 and hundreds of plans.

1 Again, it's not one -- you know, it's not one place.
2 It would be, I keep saying, just incredibly difficult to pull
3 these for all these different plans. We're not talking
4 about -- I mean, a lot of these, I think, if we could talk
5 about one or two or three plans, you know, and target, you
6 want to talk about those communications or the account teams,
7 but it's everything.

8 **THE COURT:** Okay. How many plans are -- so when you
9 say "plan," you're talking about the agreement that Express
10 Scripts has with a health insurer, so -- is that right? The
11 health insurance plan. Okay. Those are your clients?

12 **MS. HELLMANN:** Those are our clients.

13 **THE COURT:** Okay. There's got to be a number. What
14 number of those individuals -- those plans interact with
15 SaveOn?

16 **MS. HELLMANN:** I don't have a number. I can tell
17 you it's the majority of our clients. And let me just give
18 you an example. Today I Googled SaveOn Express Scripts
19 formulary, because in kind of response to this. I probably
20 had at least 50 hits of like Wash U. Wash U is one, actually.
21 Wash U has their plan summary document online, and it says, We
22 participate in SaveOn with the University of Rochester. I
23 mean, I was finding so many, because I was just -- I was kind
24 of curious about these.

25 Well, and these plan summary documents are public;

1 they're online. But I can tell you the number of hits that I
2 got that hit on Express Scripts, SaveOn, and it was all of
3 these small employer groups of a trust, like trustees of a
4 union in Iowa. They had their plan document on there. And it
5 talked about, We participate in SaveOn. You need to go to
6 Accredo. So I don't have a number, but --

7 **THE COURT:** Okay, let me ask you this. If SaveOn is
8 arguing in that litigation, that I know you are not a
9 defendant in, that actually the individual patients were not
10 negatively affected because their terms of their plans, you
11 know, didn't actually -- weren't harmed in the way that J&J is
12 describing, that it wasn't a net negative for the patient or
13 for the plan, how would anyone document whether or not that
14 was true without having these formularies?

15 **MS. HELLMANN:** Well, it's not -- I wouldn't say it's
16 a formulary. I think we're kind of interchanging words.
17 Formulary is simply a list of drugs that are covered.

18 **THE COURT:** Right.

19 **MS. HELLMANN:** It would be -- I think it would
20 probably be what's your out-of-pocket max, you know, one year
21 versus your out-of-pocket max the next year. I can't imagine
22 the number of factors that go into that.

23 **THE COURT:** Well, that's for like an individual
24 patient; right?

25 **MS. HELLMANN:** Right.

1 **THE COURT:** But if --

2 **MS. HELLMANN:** That's what --

3 **THE COURT:** Maybe I'm misunderstanding Mr. LoBiondo,
4 but you're looking at it from a plan perspective, sort of the
5 terms that the plan compensated the particular J&J product for
6 before it got involved with SaveOn versus after?

7 **MR. LOBIONDO:** Right, so if 30,000 people are
8 covered by a plan, we need one plan summary, one plan
9 formulary, not 30,000.

10 **THE COURT:** Yes. But you're still talking about
11 thousands of plan documents?

12 **MS. HELLMANN:** Yeah, but what I'm saying --

13 **THE COURT:** I just want to make sure I understand
14 your answer to this question. How would anyone document that
15 differential, the delta between, you know, what patient was
16 paying for this drug before SaveOn versus after without having
17 the information about, you know, how much it was reimbursed
18 under each of these plans before and after participation in
19 SaveOn?

20 **MS. HELLMANN:** I actually -- if you're asking my
21 opinion, I think it would be impossible to prove, because
22 even -- well, first of all, it sounds like this is probably
23 SaveOn's problem because they're the ones that raised the
24 defense. But let's -- I mean, this is why I was trying to use
25 a concrete example.

1 If Blue Cross Blue Shield, their plan design is
2 you're going to have an out-of-pocket max of \$10,000 per year,
3 right, we're going to kick in. That was pre-SaveOn.
4 Post-SaveOn they say now you're going to have an out-of-pocket
5 max of \$5000 a year; right? I can't think of the logic being
6 able to connect the difference to that to a SaveOn program
7 versus all the other things that go into health insurance.

8 So, again, if you're asking Sarah Hellmann's
9 opinion, I don't think anybody could prove that piece of it,
10 but if you're looking at the plan documents and essentially
11 out-of-pocket max or copays, right, that is in a plan
12 document. And we said we will give you exemplar plan
13 documents. Again, you can find most of them. But it's doing
14 that for every single plan? I mean, take a couple and see.

15 And again, if there is a difference connecting,
16 making that connection because it's because of or not because
17 of the SaveOn program, which only covers certain specialty
18 drugs that are pharmacy and not all the other healthcare costs
19 that go into when plans set premiums and set out-of-pocket
20 maxes and set copays.

21 **THE COURT:** Okay, understood.

22 Mr. LoBiondo.

23 **MR. LOBIONDO:** I thought that I -- they gave an
24 example that was somewhat illustrative, which is that for some
25 of these plans but probably not all of them before SaveOn,

1 patients, when they used CarePath support for their drugs, it
2 accumulated toward their out-of-pocket maximum. So we're
3 helping them afford their health care, and then at a certain
4 point they hit their deductible and their insurance takes
5 over; right?

6 **THE COURT:** Right.

7 **MR. LoBIONDO:** After SaveOn, that never happens.
8 SaveOn says you -- not a dime of the money you get from
9 CarePath, not only are we inflating it and then taking out the
10 maximum possible, the money that Janssen or J&J is making
11 available to you doesn't count towards your deductible. So
12 you are paying much more patient out-of-pocket for your
13 overall healthcare.

14 And so formulary -- I shouldn't say formulary.
15 Summary documents is not just about what is the number. It's
16 also about what kind of patient assistance is going to count.

17 **THE COURT:** What things go toward that number.

18 **MR. LoBIONDO:** And I couldn't disagree more with the
19 idea this is going to be SaveOn's problem; right? We're the
20 plaintiffs in the underlying litigation. We're going to say
21 this is why we think you're harming patients, and this is the
22 amount of damage. And SaveOn is going to say, no, you're
23 wrong about that because you haven't shown, your damages
24 expert hasn't shown a one-to-one correlation between what
25 happened before and after.

1 And SaveOn, I'm sure, and its damages expert and its
2 liability experts are not going to accept the idea that we
3 just took one template or one example plan document from ESI
4 and extrapolated it to a lot of patients. That's not
5 statistically valid. So it's not SaveOn's problem. It's
6 SaveOn's defense and we have to overcome it. So we need this
7 information.

8 **THE COURT:** I take your point there.

9 Yes, Ms. Hellmann.

10 **MS. HELLMANN:** So it sounds like, actually, the
11 issue has been narrowed down a little bit is, so after SaveOn,
12 the amount of these dollars does not go to a patient's
13 out-of-pocket.

14 **THE COURT:** Out-of-pocket, yes.

15 **MS. HELLMANN:** And that is, I mean, you can, again,
16 all the Googling I did this morning, there's a fair amount of
17 plan documents out there that say this will not count towards
18 your out-of-pocket max.

19 So it sounds like what Plaintiff is really looking
20 for are pre-SaveOn plan documents that do or do not show
21 whether the J&J dollars go to the out-of-pocket max; right?
22 And I, again, what I would propose is I'm not saying one, but
23 I'm also not saying a thousand. There's a number in between
24 there, and look to see what those plan documents say.

25 I mean, there is some middle ground here of instead

1 of looking at -- and I don't really know even post-SaveOn with
2 those plan documents because it sounds like in that litigation
3 it said these numbers will not count towards your
4 out-of-pocket maximum; right? So if what they're trying to do
5 is compare it to what happened before SaveOn, right, that's
6 very different than formularies and a lot of the other groups
7 of documents. It's, you know, what did the plan documents say
8 about copayment-assistive programs going to out-of-pocket max
9 or out-of-pocket maximums.

10 And again, give us -- they have all the plans at
11 issue, right, because they have all the contracts. Let's pull
12 an exemplary. You can pick which ones you want, and we can
13 pull some of those plan documents.

14 **THE COURT:** Okay. That sounds like a very sensible
15 way of moving forward after I grant the motion to compel as to
16 the Request No. 25 through 27 because it does seem to me that
17 this information will be necessary to Plaintiff's case or will
18 be, if it exists in the way that you think it does, but I also
19 think it would not make sense for you to go to every single
20 plan and produce all of these documents before you know if
21 it's what they actually need to make that argument.

22 And so I find that there is a sufficient basis to
23 find that this -- that these requests, such as they are,
24 describe universes of information that are relevant to the
25 case. If there is a counterargument that some of it is beyond

1 what's necessary to do what they're trying to do, then I'll
2 hear that argument after you all talk about it and there's a
3 basis for making the argument because you've produced
4 something and you've seen it and you've found it sufficient or
5 not. Fair enough?

6 **MR. LoBIONDO:** Yes, Your Honor.

7 **THE COURT:** I'm granting the motion to compel. It
8 is subject to, like every discovery request, to reasonable
9 limitations based on facts on the ground as you proceed in
10 producing the information. Those are 26 through 27, which I'm
11 treating all of a piece, and I think we are holding 28 through
12 30 in abeyance, and I think 30 is the end; is that correct?

13 **MR. LoBIONDO:** Yes, Your Honor.

14 **THE COURT:** Okay. So that's something of an answer
15 on everything. I know this probably isn't the final word;
16 although, I won't be sad if you all figure it all out on your
17 own from now on, but you know, you don't have to fill the end
18 of my August, but I will entertain any additional follow-up
19 motions to this.

20 Please don't come back to me without having spoken
21 to each other at length about the real practicalities of
22 producing the information, especially if your argument is
23 going to be based on burden. Not only do I need to see that
24 there's a big significant burden to the entire universe, I
25 need to see that you've gone to Plaintiff and said, Here's the

1 burden, let's talk about how to minimize it, and then after
2 they have been unreasonable in entertaining that proposal, I
3 will hear from -- I will hear your argument that they're being
4 unreasonable. Clear enough?

5 **MR. LoBIONDO:** Just one clarifying question.

6 **THE COURT:** Yes.

7 **MR. LoBIONDO:** So I think for most of the requests,
8 other than the data requests, they were either granted or
9 denied.

10 **THE COURT:** Right.

11 **MR. LoBIONDO:** And to the extent the aggrieved party
12 wants to --

13 **THE COURT:** Pursue it further.

14 **MR. LoBIONDO:** -- make another argument --

15 **THE COURT:** Yes.

16 **MR. LoBIONDO:** -- set a date for that. For the data
17 requests, we will obviously try to come to agreement on them.

18 **THE COURT:** Yes.

19 **MR. LoBIONDO:** Because they were held in abeyance
20 and not granted or denied --

21 **THE COURT:** Yeah.

22 **MR. LoBIONDO:** -- do you want us to submit competing
23 proposals or --

24 **THE COURT:** That's a good question. You all -- I
25 know not you individually but another member of your corporate

1 family is litigating this exact issue, right, in Tennessee
2 right now, and you definitely are litigating it?

3 **MR. LoBIONDO:** Yes.

4 **THE COURT:** I'm loath to complicate the situation
5 there or vice versa by asking you all to brief the same exact
6 thing that you're briefing there but as to a different entity
7 in the family. What do you think would be the most -- let me
8 ask you guys as the ones most involved. What would be the
9 most productive way of proceeding? I know you have time
10 concerns, and that's why I'm asking.

11 **MR. LoBIONDO:** Yeah, and I'm also perhaps a little
12 bit cynical about whether we're going to get a counterproposal
13 from them, so I think this is probably going to end with
14 competing proposals that the Court has to pick. I know that
15 you --

16 **THE COURT:** Okay.

17 **MR. LoBIONDO:** -- accurately pointed out that that's
18 not ideal for a number of reasons, but my experience with --
19 in this area is that their clients just historically are loath
20 to produce data, period, unless somebody makes them do it. So
21 I think that's where we're headed, but you know, I defer to
22 Your Honor if there's a different way --

23 **THE COURT:** You don't mind going ahead with that
24 proposal while you're also litigating it in Tennessee? Do you
25 think it would be productive to do so because it's a different

1 entity? Do you think it's different enough, the questions?

2 **MR. LoBIONDO:** There are some data requests that we
3 talked about here that are not at issue in the Accredo
4 litigation.

5 **THE COURT:** Okay.

6 **MR. LoBIONDO:** So I think, you know, at least as to
7 those, it would be good not to delay.

8 **THE COURT:** Okay.

9 **MR. LoBIONDO:** Obviously I don't have any insight
10 into when the Accredo judge is going to --

11 **THE COURT:** Right.

12 **MR. LoBIONDO:** -- rule.

13 **THE COURT:** He seems to be moving expeditiously, but
14 I don't want to assume that you'll have what you need by the
15 time you need it. Go ahead.

16 **MS. HELLMANN:** Yeah, I would say with what's at
17 issue in Accredo, we hold that in abeyance, and I think the
18 Court has ruled quickly. I think the data request that we
19 know is not at issue there --

20 **THE COURT:** Number 29.

21 **MS. HELLMANN:** -- is the all data of Johnson &
22 Johnson drugs.

23 **THE COURT:** Yes.

24 **MS. HELLMANN:** So that is ripe for discussion and
25 perhaps for, you know, proposal next Friday. Other than

1 that --

2 **THE COURT:** Yes.

3 **MS. HELLMANN:** -- I believe that is the only data
4 request that we've talked about today that is not covered by
5 Accredo.

6 **THE COURT:** Right.

7 **MS. HELLMANN:** Counsel mentioned that maybe there's
8 some more fields at Accredo that we would need. I haven't
9 heard those. I do know the one set is the all Johnson &
10 Johnson drugs by any pharmacy.

11 **THE COURT:** Okay. Well, then let's put it that way.
12 Number 29, and to the extent Plaintiff is aware of other data
13 that would still need to be -- even if Accredo was compelled
14 to produce absolutely everything that's being asked of it,
15 there are still things that would need to be obtained from
16 Express Scripts; you can take that up too in your discussions
17 this week, and if you all -- let me think.

18 I think competing proposals is as good a method as
19 any for my deciding quickly on how you guys are going to
20 proceed, and so why don't we do that with respect to the data,
21 especially insofar as we're talking about very concrete
22 things. I think making you each have to sort of lay out
23 exactly how you would go about producing or not producing that
24 information would probably be the best strategy.

25 So for next Friday, you can also produce to me,

1 unless you've come to terms, some rival proposals on how to
2 get at what Plaintiff needs from RFP Number 29 without
3 incurring the burden that I take you, Ms. Hellmann, to be
4 realistically representing, which does sound significant.

5 All right. So next Friday lots of things but
6 hopefully less than you might have had to do had we not
7 resolved the things we did today.

8 All right. Anything else before we adjourn?

9 **MR. LOBIONDO:** No, Your Honor. Thank you very much
10 for all the time that you spent on this. I appreciate it.

11 **THE COURT:** Yes, well, that's my job. But no
12 problem, again, if you want to take care of it for me from
13 here on out.

14 All right. Thank you. We're adjourned.

15 (Hearing concluded at 3:51 p.m.)

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CERTIFICATE

I, Kristine A. Toennies, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 115 inclusive and was delivered electronically and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 14th day of August, 2023.

/s/ *Kristine A. Toennies*
Kristine A. Toennies, RMR, CRR, CRC, CCR
Official Court Reporter